

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE) C-11-02509 LHK
ANTITRUST LITIGATION,)
) SAN JOSE, CALIFORNIA
)
) JANUARY 17, 2013
)
) PAGES 1-153
_____)
THIS DOCUMENT RELATES TO:)
ALL ACTIONS)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

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1 SAN JOSE, CALIFORNIA

JANUARY 17, 2013

2 P R O C E E D I N G S

3 (COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

4 THE COURT: GOOD AFTERNOON AND WELCOME.

5 THE CLERK: YOU MAY BE SEATED.

6 CALLING CASE NUMBER C-11-02509 LHK, IN RE: HIGH-TECH
7 EMPLOYEE ANTITRUST LITIGATION.

8 THE COURT: WOULD YOU LIKE TO STATE YOUR
9 APPEARANCES?

10 MR. GLACKIN: BRENDAN GLACKIN, LEIFF, CABRASER,
11 HEIMANN & BERNSTEIN. I'M WITH MY COLLEAGUES MS. DERMODY,
12 MR. HARVEY, AND MS. SHAVER.

13 ALSO JOINING US IN THE COURTROOM IS PLAINTIFF
14 MICHAEL DIVINE SEATED IN THE FRONT ROW.

15 MR. SAVERI: GOOD AFTERNOON, JUDGE KOH.
16 JOSEPH SAVERI, JOSEPH SAVERI LAW FIRM IN SAN FRANCISCO, AND
17 JAMES DALLAL AND LISA LEELOVE.

18 THE COURT: OKAY. GOOD AFTERNOON.

19 MR. MITTELSTAEDT: AND YOUR HONOR, FOR DEFENDANTS,
20 BOB MITTELSTAEDT OF JONES DAY FOR ADOBE AND INTUIT, AND WITH ME
21 ARE LYNN WONG, DAVID KIERNAN, AND CRAIG STEWART.

22 THE COURT: SO NOT EVERYONE IS ON THIS LIST. OKAY.

23 THE CLERK: I WAS TOLD THEY WERE.

24 THE COURT: YOU SAID LYNN WONG AND GREG STEWART? OR
25 CRAIG STEWART?

1 MR. MITTELSTAEDT: CRAIG STEWART.

2 THE COURT: CRAIG STEWART. OKAY, THANK YOU.

3 MR. PURCELL: GOOD AFTERNOON, YOUR HONOR.

4 DAN PURCELL OF KEKER & VAN NEST FOR LUCASFILM.

5 THE COURT: OKAY. GOOD AFTERNOON.

6 MR. PICKETT: GOOD AFTERNOON, YOUR HONOR. I'M

7 DONN PICKETT OF BINGHAM MCCUTCHEN. I'M HERE ON BEHALF OF

8 INTEL, ALONG WITH FRANK HINMAN AND SUJAL SHAW.

9 THE COURT: OKAY. GOOD AFTERNOON.

10 MR. RUBIN: GOOD AFTERNOON, YOUR HONOR. LEE RUBIN

11 FROM MAYER BROWN. WITH ME TODAY IS MY PARTNER, DON FALK FROM

12 MAYER BROWN, AND ANNE SELIN, AND ANNE SELIN IS PROBABLY NOT ON

13 THE LIST.

14 THE COURT: OKAY. AND THE LAST NAME IS SPELLED?

15 MR. RUBIN: SELIN, S-E-L-I-N.

16 THE COURT: S-E-L-I-N. OKAY, THANK YOU.

17 MR. RUBIN: THANK YOU.

18 MS. HENN: GOOD AFTERNOON, YOUR HONOR. EMILY HENN,

19 AND MY COLLEAGUE DEBORAH GARZA, OF COVINGTON & BURLING ON

20 BEHALF OF PIXAR.

21 THE COURT: OKAY. GOOD AFTERNOON.

22 MR. RILEY: GOOD AFTERNOON, YOUR HONOR.

23 GEORGE RILEY OF O'MELVENY & MYERS. I'M JOINED BY MY COLLEAGUE,

24 MICHAEL TUBACH, AND MY OTHER COLLEAGUE, CHRISTINA BROWN.

25 THE COURT: OKAY. GOOD AFTERNOON. SO HAS EVERYONE

1 STATED THEIR APPEARANCES? OKAY. ALL RIGHT. THANK YOU.

2 OKAY. LET'S HANDLE THE CLASS CERT MOTION FIRST AND THEN
3 THE CMC SECOND. AND WHY DON'T WE START WITH THE PLAINTIFFS?

4 WELL, ACTUALLY, I'M SORRY, LET MET START WITH THE
5 DEFENDANTS FIRST.

6 I JUST WANT TO NARROW THE SCOPE OF WHAT'S AT ISSUE TODAY.
7 I DIDN'T SEE IN YOUR OPPOSITION REALLY ANYTHING CHALLENGING
8 OTHER THAN -- ANY CLASS CERTIFICATION REQUIREMENT OTHER THAN
9 PREDOMINANCE. IS THAT CORRECT?

10 MR. MITTELSTAEDT: PREDOMINANCE AND SUPERIORITY.

11 THE COURT: OKAY. SO ARE YOU CONCEDED NUMEROSITY
12 AND ALL THE OTHER RULE 23 REQUIREMENTS?

13 MR. MITTELSTAEDT: FOR PURPOSES OF THIS MOTION, YES.

14 THE COURT: OKAY. SO IT'S ONLY PREDOMINANCE AND
15 SUPERIORITY. OKAY. THANK YOU. THAT HELPS US NARROW WHAT WE
16 HAVE TO COVER.

17 OKAY. LET ME GO, PLEASE, TO THE PLAINTIFFS, AND I FIRST
18 JUST WANT TO MAKE SURE THAT I UNDERSTAND WHAT YOUR THEORY IS.

19 MR. GLACKIN: OKAY.

20 THE COURT: SO IF YOU COULD, PLEASE, THERE ARE
21 CERTAIN FIGURES THAT I'D LIKE YOU TO PLEASE EXPLAIN OR
22 ELABORATE IN DR. LEAMER'S REPORT IN SUPPORT OF THE MOTION.

23 MR. GLACKIN: SURE.

24 THE COURT: SO LET ME SEE IF I UNDERSTAND THE
25 INTERNAL EQUITY THEORY THAT YOU ARE ALLEGING.

1 IS IT YOUR ASSERTION THAT ALL OF THE COMPENSATIONS FOR ALL
2 OF THE WORKERS ARE SOMEHOW LINKED, SO IF THERE'S ANY CHANGE IN
3 ONE, IT SHOULD HAVE SOME TYPE OF TRICKLE DOWN OR SOME SHADOWING
4 EFFECT ON THE OTHER EMPLOYEES OF THE SAME COMPANY? IS THAT
5 RIGHT?

6 MR. GLACKIN: YEAH, I WOULD SAY THAT'S BASICALLY
7 CORRECT, YOUR HONOR.

8 WE -- DR. LEAMER, TO BEGIN SPEAKING ABOUT THEORY, HE
9 PROPOSES THAT IF THE -- THAT GIVEN THE RECOGNIZED THEORY OF
10 INTERNAL EQUITY, THAT GAINS TO PART OF A WORK FORCE WILL BE
11 SHARED WITH OTHER MEMBERS OF THE SAME WORK FORCE. THAT'S HOW I
12 WOULD PUT IT. IT'S A SHARING OF GAINS.

13 SO IT'S NOT -- YOU KNOW, ANOTHER KIND OF SHARING, OR OF
14 LINKING THAT YOU COULD TALK ABOUT IN AN ECONOMICS MATTER WOULD
15 BE, FOR EXAMPLE, A SUPPLY AND DEMAND SIDE SUBSTITUTION. YOU
16 COULD SAY, FOR EXAMPLE, THE PRICE OF A AND THE PRICE OF B ARE
17 LINKED BECAUSE IF YOU MODIFY THE PRICE OF A, OR THE SUPPLY OF
18 A, SUPPLY AND DEMAND SIDE SUBSTITUTION FORCES ARE GOING TO DO
19 SOMETHING TO THE PRICE OF B AS A MATTER OF SUPPLY AND DEMAND.

20 THE COURT: SO LET ME ASK YOU --

21 MR. GLACKIN: THAT'S ONE KIND OF LINK. THAT'S A
22 DIFFERENT KIND OF LINKING. THAT'S WHAT I THINK OF MORE AS
23 LINKING.

24 THE COURT: AND I'M SORRY TO INTERRUPT YOU. I CAN
25 UNDERSTAND THE SHARING OF GAINS IN TERMS OF EXAMPLES THAT ARE

1 BRIEFED, LIKE A PIXAR MOVIE DOES VERY WELL SO EVERYONE GETS,
2 ACROSS THE BOARD, RECEPTION TO PRESIDENTS GET A SORT OF BONUS
3 IN THAT YEAR.

4 BUT THIS IS A SHARING OF PAIN AND NOT A SHARING OF GAIN.
5 SO WHAT SAYS THAT IF THERE'S A SUPPRESSION OF GAIN IN ONE SORT
6 OF JOB FIELD THAT THAT WOULD NECESSARILY RESULT -- AND I GUESS
7 I'M HAVING A DIFFICULTY VISUALIZING WHY THE CATEGORY OF SOU
8 CHEFS' SALARIES WOULD NECESSARILY IMPACT THE CATEGORY OF
9 ADMINISTRATIVE ASSISTANTS THAT WOULD NECESSARILY IMPACT THE
10 CATEGORY OF AN ANIMATOR VERSUS A SOFTWARE ENGINEER.

11 DO YOU SEE WHAT I'M SAYING? WHY CAN'T THOSE BE ON
12 SEPARATE TRACKS? I KNOW THAT YOU HAVE SOME DATA THAT THEY'RE
13 ALREADY ORGANIZED BY FAMILIES ANYWAY. WHY DO THE FAMILIES HAVE
14 TO ACTUALLY BE INTERLINKED? CAN'T THEY ALL JUST BE ON SEPARATE
15 GROUND?

16 MR. GLACKIN: WELL, SO THE -- THE ANSWER I WOULD
17 GIVE TO THAT IS THAT, FIRST OF ALL, WE ARE NOT TALKING ABOUT A
18 SHARING -- WE'RE TALKING ABOUT A SHARING OF PAIN IN THE SENSE
19 OF A SHARING OF TALKING ABOUT DAMAGES, BUT WE ACTUALLY ARE
20 REALLY TALKING ABOUT A SHARING OF GAIN BECAUSE WE'RE TALKING
21 ABOUT WHAT WOULD HAVE HAPPENED IN THE WORLD THAT DOESN'T EXIST,
22 WHICH IS THE WORLD WHERE THESE AGREEMENTS WERE NEVER REACHED.

23 AND WE'RE SAYING THAT IN THAT WORLD, THERE WOULD HAVE BEEN
24 COMPETITIVE GAINS THAT WOULD HAVE, IN SOME RESPECTS, BEEN
25 FOCUSED ON INDIVIDUALS OR GROUPS OF EMPLOYEES, BUT THAT THE

1 EFFECT OF THOSE GAINS WOULD HAVE BEEN WIDELY FELT ACROSS THE
2 WORK FORCES.

3 AND THERE'S -- YOU KNOW, I HEAR WHAT YOU'RE SAYING ABOUT,
4 OH, IT SORT OF DOESN'T -- IT'S SURPRISING THAT THE -- THAT WE
5 WOULD INCLUDE THE SOU CHEF, FOR EXAMPLE. WHAT'S THE
6 EXPLANATION FOR THAT?

7 AND I WOULD -- I GUESS I WOULD SAY THAT THE INTERNAL
8 EQUITY FRAMEWORK POSTULATES THAT THIS FEELING OF FAIRNESS WHICH
9 DRIVES A COMPANY'S NEED TO SHARE GAINS LIKE THIS CAN APPLY
10 COMPANY-WIDE. IT CAN APPLY IN MANY DIFFERENT WAYS AND IT CAN
11 APPLY WITH DIFFERENT STRENGTHS, CERTAINLY IN DIFFERENT
12 CONTEXTS.

13 BUT THERE IS A COMPANY-WIDE SENSE OF FAIRNESS THAT SAYS
14 THAT, UNDER CERTAIN CIRCUMSTANCES, THE GAINS SHOULD BE SHARED.

15 AND PRACTICALLY SPEAKING, AND THIS IS ACTUALLY DISCUSSED,
16 I BELIEVE, IN THE AKER -- I BELIEVE WE CITED GEORGE AKERLOF'S
17 ARTICLE, THE FAIR WAGE HYPOTHESIS. HE SAYS -- I MEAN, ONE OF
18 THE THINGS THAT HE STUDIES THERE, OR DISCUSSES, IS RESEARCH ON
19 SHARING OF GAINS BETWEEN EMPLOYEES WITH VASTLY DIFFERENT SKILL
20 SETS. SO THAT'S THE -- THAT'S THE THEORY.

21 AND THEN THE FACT OF HOW COMPENSATION WAS SET AT THESE
22 COMPANIES ALSO IS CONSISTENT AND IN LINE WITH THE PREDICTION
23 THAT AT LEAST SOME LEVEL OF THESE GAINS WOULD BE SHARED
24 COMPANY-WIDE, AND THAT FACT IS THAT THEY ALL USE ADMINISTRATIVE
25 PAY SYSTEMS, THEY SET COMPANY-WIDE COMPENSATION BUDGETS, THEY

1 SET COMPANY-WIDE RAISE BUDGETS. THIS IS ACTUALLY AN ARGUMENT
2 THAT THEY MAKE IN THEIR DECLARATIONS AND IN THEIR PAPERS.

3 AND THERE'S -- IT'S -- IF THE COMPANY COMPENSATION BUDGET
4 GOES UP BECAUSE MANAGERS ARE COMPLAINING THAT THEY NEED MORE
5 MONEY TO SATISFY THEIR EMPLOYEES OR BECAUSE THE CEO IS
6 CONCERNED ABOUT COMPETITION HE'S FACING FROM ONE OF THESE OTHER
7 COMPANIES WITH WHICH, IN THE REAL WORLD, HE HAD AN AGREEMENT SO
8 HE WASN'T CONCERNED ABOUT THAT, THAT COULD MOVE THE WHOLE PAY
9 STRUCTURE. IT COULD MOVE SALARY BANDS. IT COULD INFLUENCE
10 COMPANIES' DECISIONS ABOUT WHERE TO SET MINIMUM AND MAXIMUM
11 SALARIES FOR JOB TITLES. IT WOULD INFLUENCE COMPANIES'
12 DECISIONS ABOUT --

13 THE COURT: AND I'M SORRY TO INTERRUPT YOU. I CAN
14 UNDERSTAND HOW WITHIN THE SAME JOB FAMILY CO-WORKERS MIGHT TALK
15 AND FIND OUT, "WHAT ARE YOU MAKING? WHAT OFFER DID YOU GET?"

16 BUT WHAT IS THE EVIDENCE THAT THE SOU CHEF IS TALKING TO
17 THE ANIMATOR IS TALKING TO SOME OTHER, YOU KNOW, CO-WORKER FROM
18 A COMPLETELY DIFFERENT JOB FAMILY AND THAT THERE'S SORT OF THIS
19 EQUITY CONCERN --

20 MR. GLACKIN: UM-HUM.

21 THE COURT: -- ACROSS JOB FAMILIES?

22 MR. GLACKIN: SO I DON'T THINK THERE'S EVIDENCE -- I
23 MEAN, TO ANSWER YOUR QUESTION DIRECTLY, I DON'T THINK THERE'S
24 EVIDENCE THAT THE SOU CHEF IS TALKING TO THE CEO'S A.A., FOR
25 EXAMPLE.

1 THE COURT: UM-HUM.

2 MR. GLACKIN: I THINK THAT WHAT WE'VE -- WHAT WE'VE
3 POSTULATED AND WE WOULD SAY WHAT WE'VE DEMONSTRATED IS THAT
4 THIS INFORMATION -- THERE'S AN INFORMATION NETWORK THAT
5 CONNECTS THESE EMPLOYEES. IT DOESN'T REQUIRE THE EMPLOYEE WHO
6 RECEIVES THE INFORMATION TO TALK TO PEOPLE IN OTHER JOB
7 FAMILIES.

8 THE INFORMATION COMES INTO THE NETWORK AND IT IS -- IT IS
9 SPREAD AND THE FORCE OF -- AND THE FORCE OF INTERNAL EQUITY
10 CAUSES THE COMPETITIVE EFFECT TO BE SHARED TO SOME LEVEL ACROSS
11 THE ENTIRE WORK FORCE, OR IT CAN.

12 AND A CONCRETE EXAMPLE OF THIS IS THE GOOGLE PAY RAISE IN
13 RESPONSE TO AGGRESSIVE RECRUITING BY FACEBOOK. I MEAN, THAT
14 WAS A -- THAT WAS -- THAT'S AN EXAMPLE OF AGGRESSIVE RECRUITING
15 BY A SINGLE COMPANY THAT MOVED AN ENTIRE PAY STRUCTURE BY 10
16 PERCENT FROM SOU CHEFS TO SECRETARIES.

17 SO THIS IS NOT -- I MEAN, WE BELIEVE THAT -- I MEAN, THIS
18 IS SOUND ECONOMIC THEORY AND I DON'T THINK THERE'S A DISPUTE
19 ABOUT THAT AT THIS POINT.

20 THERE'S ALSO NOT REALLY A DISPUTE THAT THESE DEFENDANTS
21 USE ADMINISTRATIVE PAY STRUCTURES AND THAT THEY SET THEIR
22 COMPENSATION THE WAY EVERY OTHER MAJOR COMPANY IN THE WORLD
23 SETS IT.

24 AND THEN WE ALSO HAVE DOCUMENTARY EVIDENCE THAT
25 DIRECTLY -- AND THERE'S A FEW INSTANCES OF THIS THAT WE CITED

1 IN THE BRIEF -- THAT DIRECTLY LINKS COMPETITION, AGGRESSIVE
2 COMPETITION BY A SINGLE FIRM TO EITHER CONCERN ABOUT THE PAY
3 STRUCTURE MOVING IN THE CASE OF SOME OF THE PIXAR E-MAILS WE'VE
4 CITED, OR TO AN ACTUAL ENORMOUS, \$500 MILLION MOVEMENT OF THE
5 PAY STRUCTURE, WHICH IS WHAT GOOGLE DID.

6 THE COURT: LET ME ASK YOU, SINCE WE'RE
7 UNFORTUNATELY LIMITED IN TERMS OF DOCUMENTARY EVIDENCE, WHAT
8 EVIDENCE IS THERE ABOUT WHAT TYPE OF EMPLOYEES OR WHAT TYPE OF
9 JOB FAMILIES RECEIVE COLD CALLS GENERALLY?

10 MR. GLACKIN: WELL, THAT IS AN EXCELLENT QUESTION,
11 AND AS -- I MEAN, DR. LEAMER SAID, I WOULD COUNT NO FEWER THAN
12 20 TIMES IN HIS DEPOSITION, THAT HE WOULD HAVE LOVED TO HAVE
13 HAD RELIABLE DATA ABOUT THE COLD CALLING, AND THE PROBLEM IS IT
14 JUST DIDN'T EXIST. I MEAN, WE CAN ONLY WORK WITH THE DATA WE
15 HAVE.

16 I'M ALMOST TEMPTED TO QUOTE DEFENSE SECRETARY ROSENFELD,
17 YOU GO TO WAR WITH THE DATA THAT YOU HAVE.

18 AND THE DEFENDANTS DON'T DISPUTE THAT. THERE'S NO
19 ANALYSIS OF THE COLD CALLING DATA BY DR. MURPHY EITHER. THAT'S
20 WHY HE'S, WE WOULD SAY WRONGLY, BUT HE'S USING THIS PROXY
21 APPROACH BASED ON INTER-DEFENDANT HIRING, WHICH IS EVIDENCE
22 THAT WE DEVELOPED USING UNIQUE EMPLOYEE IDENTIFIERS.

23 BUT THERE'S NO -- THERE IS NO EVIDENCE IN THIS CASE ABOUT
24 HOW THAT COLD CALLING -- THERE'S NO RELIABLE EVIDENCE, I SHOULD
25 SAY, NO RELIABLE STATISTICAL EVIDENCE ABOUT HOW THAT COLD

1 CALLING WAS CONCENTRATED, IF AT ALL, TO DIFFERENT EMPLOYEES.

2 I MEAN, I WILL SAY, YOU MENTIONED SOU CHEF. THERE IS A
3 DOCUMENT IN THIS CASE THAT, YOU KNOW, DISCUSSES BEING CONCERNED
4 ABOUT LOSING A SOU CHEF.

5 THE COURT: YEAH.

6 MR. GLACKIN: SO DEFINITELY THERE'S NO DOUBT THAT
7 SOU CHEFS WERE WITHIN THE SCOPE OF THESE AGREEMENTS, SO I JUST
8 WANTED TO MENTION THAT IN CASE IT HAD SLIPPED YOUR MIND.

9 THE COURT: NO. THAT'S WHAT PROMPTED THE QUESTION
10 ACTUALLY.

11 SO LET ME ASK, I COMPLETELY AGREE WITH YOU THAT THE
12 AGREEMENTS ARE EXPLICITLY NOT RESTRICTED BY JOB FAMILY,
13 GEOGRAPHY, THEY'RE NOT LIMITED BY ANYTHING. THEY APPLY TO ANY
14 EMPLOYEE CANNOT BE COLD CALLED, COUNTER-OFFERED, OR HIRED
15 WITHOUT GETTING CONSENT OF THE CURRENT EMPLOYER.

16 BUT DOESN'T IT SEEM THAT, OVERALL, THE PRIMARY CONCERN OF
17 THESE CEO'S WAS THE TOP TALENT, AND SPECIFICALLY THE TOP
18 TECHNICAL TALENT?

19 LIKE THEY WERE OKAY ABOUT THE ADMINISTRATIVE ASSISTANT
20 FROM PIXAR. THEY'RE OKAY REALLY ABOUT THE SOU CHEF. BUT THEY
21 REALLY DON'T WANT THE TOP TECHNICAL TALENT LEAVING.

22 MR. GLACKIN: I MEAN, I WOULD -- SO FIRST OF ALL, I
23 WOULD HASTEN TO ADD THAT WE HAVEN'T ACTUALLY DEPOSED ANY OF THE
24 CEO'S YET, SO THE DISCOVERY RECORD IS STILL OPEN ON WHAT THEY
25 THINK.

1 I WOULD SAY THAT THERE IS CERTAINLY SOME EVIDENCE IN THE
2 RECORD, AND WE CITED IT I BELIEVE ON THE LAST PAGE, OR LAST TWO
3 PAGES OF OUR OPENING BRIEF, WHICH IS WHERE WE ALSO DISCUSSED --
4 WE EXPLAINED WHY WE PROPOSED A POSSIBLE ALTERNATIVE CLASS.

5 THERE IS SOME EVIDENCE OF THEM BEING CONCERNED ABOUT THAT;
6 THERE'S ALSO EVIDENCE OF THEM BEING CONCERNED ABOUT THE ENTIRE
7 PAY STRUCTURE; AND THEN THERE IS ALSO EVIDENCE OF THEM BEING
8 CONCERNED ABOUT THE SOU CHEF, I MEAN, FIGURATIVELY SPEAKING.

9 SO I WOULD AGREE THAT THERE IS SOME EVIDENCE OF THE KIND
10 THAT YOU DESCRIBE.

11 BUT I WOULD ALSO AGREE -- SAY THAT THERE'S EVIDENCE THAT
12 THEY WERE CONCERNED ABOUT OTHER THINGS.

13 THE COURT: OKAY. THANK YOU. LET ME GO TO THE
14 DEFENDANTS.

15 WHY DIDN'T YOUR CLIENTS RESTRICT THESE AGREEMENTS TO
16 SPECIFIC TYPES OF EMPLOYEES? AND THERE'S CERTAINLY DOCUMENTARY
17 EVIDENCE WHERE -- I CAN'T RECALL WHO THE COMPANY WAS -- BUT I
18 KNOW STEVE JOBS WAS INVOLVED WHERE THEY TRIED TO NARROW THE
19 CLASS OF EMPLOYEES WHO COULDN'T BE SOLICITED, OR I SHOULD SAY
20 CLASS EMPLOYEES, AND THE AGREEMENT WAS, NO, JUST ANY EMPLOYEE.
21 DON'T CONTACT THEM.

22 SO YOU TELL ME, WHY SHOULD THERE BE ANY FURTHER
23 RESTRICTION WHEN THE AGREEMENT IS PRETTY EXPLICIT THAT IT
24 APPLIES TO ANY EMPLOYEE, AND THERE'S CERTAINLY E-MAILS WITH
25 STEVE JOBS AND OTHER CEO'S NOT LIMITING IT TO ANY PARTICULAR

1 TYPE OF EMPLOYEE.

2 MR. MITTELSTAEDT: I THINK, YOUR HONOR, THE ISSUE IS
3 WHO WAS IMPACTED. NOT JUST WHO DIDN'T GET A CALL, BUT WHO WAS
4 IMPACTED, WHO WOULD HAVE RECEIVED A RAISE, WHO WOULD HAVE GONE
5 TO ANOTHER JOB IF THEY HAD RECEIVED A CALL.

6 IN THE CASES THAT WE'VE CITED, REED, WEISFELD, MPT, AND
7 JOHNSON, THE AGREEMENTS THERE WERE BROAD RANGING. SOME OF
8 THOSE CASES INVOLVED JUST NURSES, AND IN REED, FOR EXAMPLE, THE
9 COURT SAID THE QUESTION IS, IS THERE IMPACT ON THE NURSES
10 ACROSS THE BOARD AND DOES THE PLAINTIFF HAVE A METHOD OF
11 PROVING IMPACT ACROSS THE BOARD?

12 AND WHAT THE COURT FOUND IN REED, LIKE THE OTHER CASES, IS
13 THAT IF THE PLAINTIFFS HAVE TO GO PERSON BY PERSON, DEPARTMENT
14 BY DEPARTMENT, COMPANY BY COMPANY, TO DETERMINE WHO WAS
15 IMPACTED, NOT JUST WHO WAS WITHIN THE SCOPE OF WHETHER IT'S A
16 NO HIRING --

17 THE COURT: SO YOU CONCEDE THAT ALL EMPLOYEES WERE
18 IN THE SCOPE. YOUR POSITION IS JUST THAT ONLY WHAT -- CAN YOU
19 DEFINE THE CATEGORY OF EMPLOYEES THAT WERE ACTUALLY DAMAGED?

20 MR. MITTELSTAEDT: I'M MAKING THE LATTER POINT,
21 CERTAINLY. AND IT'S, IN MY VIEW -- AND I'LL GET INTO THIS --
22 IT'S NOT WHAT CATEGORIES. IT'S INDIVIDUAL BY INDIVIDUAL.

23 BUT ON THE FIRST POINT, THESE AGREEMENTS, TO THE EXTENT
24 THEY WERE ACTUAL AGREEMENTS, DIFFERED FROM COMPANY TO COMPANY
25 TO COMPANY, BOTH AS TO THE TERMS AND WHO THEY COVERED, SO I

1 CAN'T MAKE ANY BROAD GENERALIZATION ABOUT ALL OF THEM COVERED
2 EVERYBODY OR NONE OF THEM COVERED EVERYBODY. THEY REALLY NEED
3 TO BE TAKEN ONE BY ONE.

4 BUT --

5 THE COURT: SO TELL ME, WHAT ARE THE CHARACTERISTICS
6 OF THE INDIVIDUALS THAT THE DEFENDANTS WOULD CONCEDE WERE
7 DAMAGED?

8 MR. MITTELSTAEDT: WELL, NONE OF THE NAMED
9 PLAINTIFFS FIT THIS CATEGORY.

10 BUT YOUR HONOR SAID, IN APRIL, AFTER READING THE
11 COMPLAINT, AFTER SEEING THE PLAINTIFFS' THEORY --

12 THE COURT: I DON'T WANT TO HEAR WHAT I SAID. I
13 WANT TO HEAR YOUR POSITION. WHAT ARE -- HOW WOULD YOU DESCRIBE
14 THE CHARACTERISTICS OF INDIVIDUALS THAT THE DEFENDANTS CONCEDE
15 WERE DAMAGED? I DON'T WANT TO HEAR WHAT I SAID.

16 MR. MITTELSTAEDT: OKAY. IT WOULD BE SOMEBODY WHO
17 WOULD HAVE RECEIVED A COLD CALL BUT FOR THE AGREEMENTS; WOULD
18 HAVE TAKEN THAT COLD CALL, TAKEN IT FAR ENOUGH DOWN THE ROAD TO
19 GET SOME SALARY INFORMATION; AND THEN WENT INTO HIS OR HER BOSS
20 AND SAID, "I'VE GOT AN OFFER FROM ANOTHER COMPANY AT A HIGHER
21 WAGE. WILL YOU NEGOTIATE AND GIVE ME A RAISE?"

22 AND THEN IF THAT -- IF THE MANAGER SAYS, "NO, ACTUALLY, I
23 DON'T WANT TO GIVE YOU A RAISE," THEN THAT PERSON HAS TO DECIDE
24 WHETHER THEY WOULD TAKE THE JOB AT THE COMPETING COMPANY.

25 IF THAT PERSON COULD SHOW THAT THEY WOULD HAVE RECEIVED A

1 CALL, IT WOULD HAVE LED TO A RAISE, THEN THEY COULD SAY THAT
2 THEY WERE DAMAGED BY AN AGREEMENT THAT KEPT THEM FROM GETTING
3 THE CALL.

4 THE COURT: AND THE DEFENDANTS CONCEDE THAT THERE
5 ARE INDIVIDUALS LIKE THAT AT ALL OF YOUR CLIENTS' COMPANIES?

6 MR. MITTELSTAEDT: WELL, I DON'T THINK ANYBODY HAS
7 BEEN IDENTIFIED. I KNOW THE NAMED PLAINTIFFS DON'T FIT INTO
8 THAT CATEGORY.

9 MR. DIVINE, FOR EXAMPLE, HE HELD SOME --

10 THE COURT: AND I'VE READ ABOUT THE NAMED
11 PLAINTIFFS, SO LET'S NOT GO THERE.

12 MR. MITTELSTAEDT: OKAY.

13 THE COURT: LET ME ASK -- THERE IS NINTH CIRCUIT
14 CASE LAW THAT SAYS DAMAGE CALCULATIONS SHOULD NOT DEFEAT CLASS
15 CERTIFICATION, BUT IT SEEMS LIKE THAT'S THE CRUX OF YOUR
16 OPPOSITION IS THAT YOU'RE SAYING THAT THE PLAINTIFFS NEED TO
17 SHOW INDIVIDUALIZED INJURY AND THEY CAN'T DO THAT, AND THEY
18 CAN'T DO A DAMAGES CALCULATION, THEREFORE, THEY CAN'T GET A
19 CLASS CERTIFIED.

20 DO YOU WANT TO RESPOND TO THAT? I'M THINKING OF YOKOYAMA.
21 GO AHEAD, PLEASE.

22 MR. MITTELSTAEDT: TO STATE AN ANTITRUST TRUST CAUSE
23 OF ACTION, THE PLAINTIFF NEEDS TO SHOW THAT THERE WAS A
24 VIOLATION, AND THAT'S WHAT THEY USE THEIR AGREEMENT -- THE
25 AGREEMENTS FOR.

1 THE COURT: AND LET ME ASK YOU, DO YOU FIGHT -- DO
2 YOU CONTEST THAT PRONG OF THE ANALYSIS?

3 MR. MITTELSTAEDT: NOT FOR PURPOSES OF THIS
4 MOTION --

5 THE COURT: OKAY.

6 MR. MITTELSTAEDT: -- EXCEPT TO SAY THIS, YOUR
7 HONOR: WHEN THEY ALLEGE AN OVERARCHING AGREEMENT, SOMETHING
8 THAT THE D.O.J. DID NOT ALLEGE, YOU KNOW, THAT LOOKS LIKE IT'S
9 A COMMON ISSUE.

10 WHEN THEY GET INTO, YOU KNOW, AN AGREEMENT BY ADOBE WITH
11 APPLE, THAT IS A DIFFERENT ANALYSIS, A DIFFERENT INQUIRY AT
12 TRIAL, IF YOU WILL, THAN WHETHER THERE WAS AN AGREEMENT BETWEEN
13 PIXAR AND LUCASFILM.

14 AND SO, YOU KNOW, WHEN YOU LOOK AT JUST AN INDIVIDUAL --

15 THE COURT: BUT I DIDN'T SEE THAT IN YOUR
16 OPPOSITION. I DIDN'T SEE YOU MAKING THAT ARGUMENT. CAN YOU
17 POINT ME TO -- I DIDN'T SEE YOU CHALLENGING THAT THERE WAS AN
18 ANTITRUST TRUST VIOLATION IN YOUR OPPOSITION.

19 MR. MITTELSTAEDT: AND THAT --

20 THE COURT: IF YOU DID, CAN YOU POINT ME TO IT?
21 THAT'LL JUST HELP US WITH GETTING THE ORDER DRAFTED.

22 MR. MITTELSTAEDT: NO. AND, YOUR HONOR, THAT --
23 THAT'S BECAUSE THEY ARE ALLEGING THE OVERARCHING CONSPIRACY AND
24 YOUR HONOR LET THAT GO ON THE MOTION TO DISMISS.

25 THE COURT: UM-HUM.

1 MR. MITTELSTAEDT: BUT AFTER --

2 THE COURT: SO THAT'S NOT BEING CHALLENGED? THE
3 FACT OF THE ANTITRUST VIOLATION IS NOT BEING CHALLENGED FOR
4 PURPOSES OF THIS CLASS CERT MOTION?

5 MR. MITTELSTAEDT: WELL, THE -- THE WAY I WOULD
6 PHRASE IT IS, ARE WE CONTESTING THAT THAT'S AN INDIVIDUAL ISSUE
7 OR A COMMON ISSUE? AND I'M -- I THINK THAT'S A COMMON ISSUE.

8 THE COURT: OKAY.

9 MR. MITTELSTAEDT: BUT THE SECOND ELEMENT OF AN
10 ANTITRUST LIABILITY CLAIM IS THAT THE PLAINTIFF SHOWS IMPACT ON
11 HIM OR HER OF THE VIOLATION, AND SO THAT'S BEFORE YOU GET TO
12 DAMAGES, THE AMOUNT OF DAMAGES. THEY HAVE TO SHOW AN IMPACT.

13 AND IN REED, AGAIN -- AND REED -- YOU KNOW, IF THERE'S A
14 SINGLE CASE THAT'S THE MOST IMPORTANT HERE, YOUR HONOR, I THINK
15 IT IS THE REED CASE.

16 AND IN THE REED CASE, THE COURT IS QUOTING FROM THE THIRD
17 CIRCUIT IN HYDROGEN PEROXIDE, AND IT SAYS, "IN ANTITRUST CASES,
18 IMPACT OFTEN IS CRITICALLY IMPORTANT FOR PURPOSES OF EVALUATING
19 THE PREDOMINANCE REQUIREMENT BECAUSE IT'S AN ELEMENT OF THE
20 CLAIM THAT MAY CALL FOR INDIVIDUAL AS OPPOSED TO COMMON PROOF."

21 AND SO WHAT WE'RE SAYING IS THAT THE ONLY WAY FOR THE
22 PLAINTIFFS TO SHOW IMPACT, NAMELY, THAT SOMEBODY WAS INJURED IN
23 HIS OR HER PROPERTY OR BUSINESS -- AND THAT'S, THAT'S WHAT THEY
24 NEED TO SHOW UNDER AN ANTITRUST VIOLATION -- IN ORDER TO SHOW
25 THAT, THEY HAVE TO GO INDIVIDUAL BY INDIVIDUAL.

1 THEY HAVE TO SHOW, YOU KNOW, WHO WOULD HAVE RECEIVED THE
2 COLD CALL, WHAT IT WOULD HAVE LED TO. THEY HAVE TO SHOW IT
3 WOULD HAVE LED TO A PAY RAISE, EITHER AT THAT COMPANY OR AT
4 ANOTHER COMPANY.

5 AND THAT IS WHERE ALL THESE CASES HAVE SAID THAT'S AN
6 INDIVIDUAL QUESTION. WOULD THERE HAVE BEEN AN IMPACT?

7 THE COURT: I'M SORRY TO INTERRUPT YOU.

8 WHAT IS THE DEFENDANTS' POSITION AS TO WHAT TYPES OF
9 EMPLOYEES OR MAYBE JOB FAMILIES WOULD BE SUBJECT TO A COLD
10 CALL? OR DO YOU HAVE A POSITION?

11 MR. MITTELSTAEDT: WELL, NOT REALLY. THAT'S WHAT I
12 SAID BEFORE, THAT ALL OF THE -- EACH OF THESE AGREEMENTS WAS
13 DIFFERENT.

14 THE COURT: UM-HUM.

15 MR. MITTELSTAEDT: EACH COMPANY WAS IN A DIFFERENT
16 POSITION. SOME COMPANIES WERE LOOKING FOR A CERTAIN TYPE OF
17 EMPLOYEES. OTHERS WERE LOOKING FOR OTHER TYPES OF EMPLOYEES.
18 SO I DON'T THINK IT CAN BE GENERALIZED.

19 BUT TO ME, YOUR HONOR, THE IMPORTANT POINT ISN'T THE SCOPE
20 OF THE AGREEMENTS. IT'S WHO THEY CAN SHOW WAS IMPACTED.

21 AND, YOU KNOW, THEY HAVE -- AND WE DON'T THINK THEY HAVE
22 COME UP WITH A METHOD TO SHOW, BY COMMON EVIDENCE ACROSS THE
23 BOARD, WHO WAS INJURED.

24 AND SO IF I CAN BE PERMITTED TO JUST SAY ONE THING THAT
25 YOUR HONOR HAD SAID, BECAUSE IT'S -- I THINK IT GOES TO THE

1 HEART OF THIS.

2 AT THE START OF THIS CASE, YOUR HONOR TURNED TO THE
3 PLAINTIFFS AND SAID, YOU KNOW, THE CLASS OF EVERYBODY IS JUST
4 INTUITIVELY TOO BROAD.

5 AND YOUR HONOR SAID, "YOU NEED TO FIGURE OUT WHO WAS
6 IMPACTED, NOT WHO WAS IN THE SCOPE OF THE AGREEMENTS, BUT WHO
7 WAS IMPACTED."

8 AND THE PLAINTIFF SAID, IN APRIL, THAT THAT'S WHY THEY
9 NEEDED THE DATA, AND THEY SAY, "IT'S ONE OF THE QUESTIONS WE'RE
10 ASKING OUR ECONOMIST. IT'S ONE OF THE QUESTIONS THAT IS
11 EMBEDDED IN OUR REQUEST FOR DATA."

12 AND THEN IN JUNE WHEN THEY CAME BACK AND ASKED FOR MORE
13 TIME TO ANALYZE THE DATA, THEY SAID -- AND THIS IS AT PAGE 21
14 OF THE JUNE TRANSCRIPT -- "ONE OF THE THINGS WE NEED TO DO WITH
15 THE DATA IS TO LOOK AT IT AND SEE WHAT IMPACT. WE NEED TO GET
16 THE DATA TO HELP ADDRESS THE VERY SPECIFIC QUESTION YOU'RE
17 ASKING, WHICH IS, WHAT'S THE CLASS IN THIS CASE?"

18 THEY SAID, "WE DIDN'T HAVE ACCESS TO DATA AT THE START,
19 THEY DIDN'T HAVE ACCESS AT THE START, WE NEED THAT DATA TO HELP
20 ANSWER THAT QUESTION. WE'RE GOING TO MAKE A MOTION FOR CLASS
21 CERTIFICATION THAT'S GOING TO BE AS SPECIFIC AS WE CAN BASED ON
22 WHAT THE DATA SHOWS."

23 AND SO WE'VE GIVEN THEM 12 YEARS OF COMPENSATION DATA AND
24 IF THERE WERE ANYTHING TO THE CLAIM THAT WHEN -- AND FOUR OF IT
25 WAS BEFORE THE -- OR, YEAH, FOUR YEARS WAS BEFORE THE ALLEGED

1 VIOLATION PERIOD.

2 IF THERE WERE ANYTHING TO THEIR CLAIM THAT PEOPLE WOULD
3 GET COLD CALLS, THAT THE COLD CALLS WOULD LEAD TO A RAISE FOR
4 THAT PERSON AND THEN IT WOULD LEAD TO A RAISE FOR SOMEBODY
5 ELSE, EVEN WITHIN THE SAME DEPARTMENT, THERE WOULD BE AMPLE
6 EVIDENCE OF THAT IN THE DATA.

7 IT WOULD -- YOU KNOW, IF ALL THESE COMPANIES HAD THIS
8 INTERNAL EQUITY SYSTEM WHICH MEANT THAT A RAISE FOR ONE IS A
9 RAISE FOR EVERYBODY --

10 THE COURT: OKAY. I'M SORRY. I'M GOING TO
11 INTERRUPT YOU, BECAUSE UNFORTUNATELY I HAVE A LONG LIST OF
12 TOPICS THAT I WANT TO COVER WITH YOU ALL.

13 MR. MITTELSTAEDT: SURE.

14 THE COURT: OKAY. THANK YOU.

15 OKAY. LET ME GO BACK TO THE PLAINTIFFS, AND WE'RE KIND OF
16 STUCK ON COLD CALLING FOR A LITTLE WHILE.

17 I GUESS I'M STILL BACK TO THE SAME ISSUE OF WHETHER THERE
18 SHOULD BE REFINEMENT OF THE CLASS, AND I GUESS THE QUESTION IS,
19 FIRST, WHETHER THERE SHOULD BE SOME NARROWING OF THE MARKET BY
20 EITHER GEOGRAPHY OR BY TYPE OF WORK. WOULD YOU ADDRESS THAT
21 QUESTION FIRST?

22 MR. GLACKIN: SURE. THAT'S TWO QUESTIONS.

23 IN TERMS OF GEOGRAPHY, THAT'S AN ISSUE THAT WE HAVE NOT
24 STUDIED AND THAT HAS NOT BEEN SUGGESTED BY THE DEFENDANTS AS
25 PROPER, SO AS I'M STANDING HERE, I DON'T HAVE AN OPINION AS TO

1 WHETHER OR NOT THAT WOULD BE SENSIBLE.

2 I'M NOT AWARE OF ANY EVIDENCE THAT HOW THE DEFENDANTS' PAY
3 STRUCTURE OPERATED WAS SORT OF EXISTENTIALLY DIFFERENT
4 DEPENDING ON WHERE A WORKER WAS LOCATED. CERTAINLY THEY MAY
5 HAVE PAID PEOPLE DIFFERENTLY BASED ON WHERE THEY WORK, I MEAN,
6 DIFFERENT ACTUAL AMOUNTS OF MONEY.

7 BUT ALL OF THAT WOULD BE ACCOUNTED FOR IN THE DATA
8 ANALYSIS THAT WE'VE DONE. OR IT WOULD BE INCLUDED -- I SHOULD
9 SAY IT'S INCLUDED IN THAT INDIVIDUAL EMPLOYEE COMPENSATION
10 NUMBER.

11 IN TERMS OF TYPE OF WORK, WE TOOK THE -- WE TOOK THE ISSUE
12 SERIOUSLY, YOUR HONOR, AND THAT'S WHY WE OFFERED THIS, WHAT
13 WE -- THE REASON WE OFFERED AN ALTERNATIVE CLASS THAT WE CALL
14 THE TECHNICAL CLASS IS BECAUSE WE WANTED TO DEMONSTRATE THAT IF
15 THERE WAS A CONCERN ABOUT COHESIVENESS, IF YOU WILL, FOR WANT
16 OF A BETTER TERM, THAT WE COULD MEET THAT CONCERN BY SIMPLY
17 LOOKING AT THE JOB TITLES OF -- USED BY THE DEFENDANTS AND
18 CALLING OUT PEOPLE WHO ARE WORKING IN SOFTWARE, TECHNICAL, AND
19 CREATIVE POSITIONS BASED ON A REVIEW OF THE JOB TITLES.

20 WE THINK THAT, AS I SAID, THAT THE IMPACT WAS BROADER THAN
21 THAT.

22 BUT IF YOUR HONOR HAD WHAT I WOULD CHARACTERIZE AS SORT OF
23 A COHESION CONCERN, THAT WE WOULD -- THAT'S -- THAT WE WOULD
24 PROPOSE IS THE BEST WAY TO ADDRESS IT. I'M OPEN TO HEARING
25 OTHER IDEAS, BUT THAT WAS OUR IDEA.

1 AND THEN IN TERMS OF -- JUST IN TERMS OF THE DATA AND ALL
2 THE THINGS THAT WERE SAID, WE REALLY WANTED THE COLD CALLING
3 DATA. WE REALLY WANTED RELIABLE DATA ABOUT THE COLD CALLING
4 AND IT JUST DOESN'T EXIST AND THAT IS -- THAT IS SOMETHING WE
5 WERE AFTER AND WE DON'T HAVE IT. SO THAT IS WHY WE CAN'T
6 ANSWER THE QUESTION OF HOW COLD CALLING WOULD HAVE BEEN
7 FOCUSSED.

8 BUT JUST TO GET BACK TO THE --

9 THE COURT: IS THERE DEFINITE -- LET'S TALK ABOUT
10 YOUR TECHNICAL ALTERNATIVE CLASS. IS THERE DEFINITE
11 INTERCHANGEABILITY THERE, LIKE WOULD INTUIT NEED AN ANIMATOR?
12 LIKE HOW --

13 MR. GLACKIN: NO. THERE'S -- I MEAN, I THINK -- AND
14 DR. LEAMER TESTIFIED TO THIS AT HIS DEPOSITION. I MEAN,
15 THESE -- THERE ARE MULTIPLE DIFFERENT -- IF YOU WERE GOING TO
16 DO A MARKET-WIDE ANALYSIS, THERE ARE MULTIPLE DIFFERENT MARKETS
17 AT ISSUE HERE.

18 THE COURT: UM-HUM.

19 MR. GLACKIN: AND, NO, I WOULD NEVER SAY THAT
20 EVERYONE IN THE TECHNICAL CLASS IS INTERCHANGEABLE, JUST AS I
21 WOULD NEVER SAY THAT EVERYBODY IN THE LARGER CLASS IS
22 INTERCHANGEABLE FROM A MARKET ANALYSIS STANDPOINT.

23 BUT, AGAIN, OUR WHOLE -- OUR WHOLE -- THE WHOLE THRUST OF
24 DR. LEAMER'S ANALYSIS HERE, AND ACROSS 130 PAGES, IS THAT A
25 TRADITIONAL MARKET ANALYSIS OF THIS CONDUCT IS THE WRONG WAY TO

1 LOOK AT A LABOR MARKET. IT JUST DOESN'T APPLY TO A LABOR
2 MARKET AND A RESTRICTION ON COMPETITIVE INFORMATION IN A LABOR
3 MARKET.

4 AND THERE'S -- I MEAN, I'M NOT GOING TO RECAPITULATE
5 EVERYTHING HE SAID, BUT THAT'S THE WHOLE POINT IS THAT THAT
6 INTERCHANGEABILITY QUESTION REALLY GOES TO A TROPE THAT IS NOT
7 APPLICABLE HERE.

8 THE COURT: SO DOES THAT UNDERMINE THE OVERARCHING
9 CONSPIRACY THEN? DOES THAT RE-ENFORCE THAT THE BILATERAL
10 AGREEMENTS WERE REALLY REFLECTING THE RELEVANT MARKET FOR
11 EMPLOYEES, LIKE THE TWO COMPANIES THAT WOULD ACTUALLY COMPETE
12 FOR THE SAME WORKERS ENTERED INTO A BILATERAL AGREEMENT AND
13 THERE WOULDN'T KIND OF BE THE SORT OF OVERARCHING, YOU KNOW,
14 INTUIT NEEDS A PIXAR PERSON AND SORT OF ALL THAT, THE CROSS
15 DEMAND THAT WE HAD TALKED ABOUT --

16 MR. GLACKIN: YEAH.

17 THE COURT: -- ON THE MOTION TO DISMISS?

18 MR. GLACKIN: I MEAN, I THINK THAT THERE'S -- I
19 MEAN, THERE'S A FEW THINGS TO UNPACK THERE.

20 I MEAN, TO THE EXTENT THAT WE'RE TALKING ABOUT, AS A
21 QUESTION OF LAW, WHETHER -- OR AS A QUESTION, I SHOULD SAY, OF
22 ANTITRUST VIOLATION AND WHETHER THERE WAS A SINGLE CONSPIRACY
23 OR MORE THAN ONE CONSPIRACY, AS TO THAT QUESTION I WOULD SAY
24 THAT, AGAIN, WE HAVE YET TO DEPOSE ANY OF THE PEOPLE WHO WERE
25 THE ARCHITECTS OF THIS CONSPIRACY.

1 THE COURT: WHEN ARE THOSE DEPOSITIONS GOING
2 FORWARD?

3 MR. GLACKIN: THEY'RE SET ACTUALLY TO START NEXT
4 WEEK, AND WE ARE GOING TO HAVE TO GET DONE BEFORE THE END OF
5 DISCOVERY, WHICH IS, I BELIEVE, TOWARDS THE END OF MARCH. SO
6 THEY'RE HAPPENING.

7 I DON'T KNOW WHAT THEY'RE GOING TO SAY. I DON'T KNOW THAT
8 THEY'RE GOING TO ADMIT THAT THERE WAS A SINGLE CONSPIRACY.

9 BUT THAT'S -- THAT'S AN ISSUE THAT THEY'RE NOT CONTESTING
10 AND I SUSPECT THAT -- FOR THE PURPOSES OF THIS MOTION, AND I
11 SUSPECT THAT PART OF THAT MAY BE THAT WE CAN VERY EASILY SAY
12 THAT DISCOVERY IS COMPLETELY OPEN ON THIS POINT.

13 THE COURT: WHY WEREN'T THOSE SCHEDULED -- I THINK
14 IT'S VERY CONVENIENT THAT THEY WERE NOT SCHEDULED UNTIL AFTER
15 THE HEARING ON CLASS CERT.

16 MR. GLACKIN: WELL, WE'VE BEEN -- I DON'T KNOW WHAT
17 TO SAY EXCEPT TO SAY WE'VE BEEN PRESSING FOR THEM AND WE WOULD
18 HAVE LIKED TO HAVE TAKEN SOME OF THEM FASTER AND WE REQUESTED
19 SOME OF THEM BEFORE THE HEARING. BUT THAT IS WHERE WE ARE.

20 THE COURT: WELL, WHEN WE GO THROUGH THE CMC, I WANT
21 YOU TO GIVE ME ALL OF THE DATES AND THOSE DATES ARE GOING TO
22 STICK.

23 MR. GLACKIN: OKAY.

24 THE COURT: OKAY?

25 ALL RIGHT. LET ME ASK WITH REGARD TO YOUR ALTERNATIVE

1 CLASS, DO WE KNOW -- AND WE PROBABLY DON'T BECAUSE THERE'S NO
2 COLD CALLING DATA -- WHETHER THE INDIVIDUALS IN THAT CATEGORY,
3 OR THAT CLASS, WOULD HAVE RECEIVED COLD CALLS OR WOULD HAVE
4 BEEN LIKELY SUBJECT TO COLD CALLS?

5 MR. GLACKIN: WELL, I THINK THAT -- I MEAN, HOW CAN
6 I PUT THIS? SO THE DEFENDANTS ARE TECHNOLOGY COMPANIES, BY AND
7 LARGE, AND SO THEIR TECHNOLOGY TALENT IS A BIG PART OF THEIR
8 WORK FORCE UNLIKE, SAY, BURGER KING. COLD CALLING MATTERED TO
9 THEM. THEY HAD LARGE STAFFS OF PEOPLE WHO MADE A LOT OF COLD
10 CALLS TO TRY TO FILL OPEN POSITIONS.

11 SO I FEEL -- IT WAS -- I WOULD SAY IT WAS A SIGNIFICANT
12 RECRUITING CHANNEL FOR THEM, FOR EACH OF THEM, OR AT LEAST NOT
13 A NEGLIGIBLE ONE.

14 BUT BEYOND THAT, WE'RE NOT IN A POSITION TO SAY THAT
15 MEMBERS OF ONE -- MEMBERS OF ONE EMPLOYEE GROUP OR ONE, YOU
16 KNOW, OF THE SMALLER CLASS ARE MORE LIKELY TO HAVE RECEIVED
17 COLD CALLS THAN MEMBERS OF THE -- THAN CLASS MEMBERS NOT IN
18 THAT SMALLER CLASS. WE'RE NOT IN A POSITION TO SAY THAT ONE
19 WAY OR THE OTHER, NOT BASED ON EVIDENCE. I MEAN, WE COULD
20 SPECULATE, BUT NOT BASED ON EVIDENCE.

21 THE COURT: LET ME ASK ABOUT YOUR NAMED PLAINTIFFS.
22 THEY'RE ALL SOFTWARE ENGINEERS, OR THEY WERE. I KNOW SOME OF
23 THEM ARE DOING DIFFERENT OCCUPATIONS RIGHT NOW.

24 MR. GLACKIN: CORRECT.

25 THE COURT: HOW WERE THEY TYPICAL? AND I'M

1 UNDERSTANDING THAT THE DEFENDANTS ARE NOT CHALLENGING
2 TYPICALITY HERE, BUT HOW ARE THEY TYPICAL OF THE SOU CHEFS AND
3 ADMINISTRATIVE ASSISTANTS AND THE OTHER TYPES OF EMPLOYEES?

4 MR. GLACKIN: WELL, IN AN ANTITRUST CASE, TYPICALITY
5 IS -- YOU KNOW, ORDINARILY THE MOST TYPICAL THING ABOUT THE
6 CLASS REPRESENTATIVE IS THAT THEY HAVE THE ISSUE THAT'S COMMON
7 TO THE WHOLE CLASS, WHICH IS THE VIOLATION.

8 AND USUALLY WHEN YOU LOOK AT -- WHEN YOU ASK ABOUT
9 TYPICALITY IN AN ANTITRUST CASE, YOU MIGHT BE ASKING YOURSELF
10 IF IT'S POSSIBLE TO -- IF THERE'S SOME SORT OF FUNDAMENTAL
11 CONFLICT BETWEEN THIS PERSON AND OTHER MEMBERS OF THE CLASS
12 THAT MAKES THEIR CLAIM SO UNUSUAL THAT THEY'RE GOING TO BE A
13 BAD CLASS REPRESENTATIVE. I MEAN, IT'S A RELATED CONCEPT TO
14 ADEQUACY.

15 AND I DON'T THINK THERE'S ANYTHING ABOUT OUR PROPOSED
16 CLASS REPRESENTATIVES, ABOUT THE PLAINTIFFS HERE, THAT SUGGESTS
17 THAT THERE -- THAT SUCH A CONFLICT EXISTS, THAT THE CLASS WOULD
18 BE DISADVANTAGED BECAUSE THEIR CLAIM IS A LOT DIFFERENT THAN
19 THE CLASS -- THAN THE CLAIM OF SOMEBODY ELSE IN THE CLASS. I
20 THINK THEY'RE COMPLETELY, FOR PURPOSES OF THIS MOTION,
21 COMPLETELY TYPICAL.

22 THE COURT: AND YOU'RE SAYING THAT BECAUSE YOU
23 BELIEVE THEIR INJURY IS THE SAME BASED ON THE VIOLATION OF
24 SUPPRESSED COMPENSATION?

25 MR. GLACKIN: CORRECT. THEY HAVE THE SAME -- THEY

1 SHARE IN COMMON THE TWO THINGS THAT REALLY MATTER. THEY WERE
2 EMPLOYED BY THE DEFENDANTS, BY DEFENDANTS; AND THE DEFENDANT
3 THAT EMPLOYED THEM WAS A PARTY TO AN UNLAWFUL AGREEMENT OR
4 AGREEMENTS.

5 THE COURT: THE PLAINTIFFS RELY, IT APPEARS, HEAVILY
6 ON JUDGE ILLSTON'S DECISION ABOUT THE CLASS CERT ANALYSIS
7 REALLY JUST BEING ON THE METHOD FOR FIGURING OUT WHETHER
8 THERE'S CLASS-WIDE IMPACT VERSUS ACTUALLY LOOKING AT THE MERITS
9 OF WHETHER THERE HAS, IN FACT, BEEN CLASS-WIDE IMPACT.

10 MR. GLACKIN: CORRECT.

11 THE COURT: TELL ME WHY, AFTER DUKES V. WAL-MART, I
12 SHOULD FOLLOW JUDGE ILLSTON, WHO I ADMIRE A LOT AND RESPECT A
13 LOT, BUT WHY, AFTER DUKES, SHOULD I DO THAT?

14 MR. GLACKIN: OH, SURE. SO -- EXCUSE ME -- I DON'T
15 THINK THAT DUKES HAS HAD ANY EFFECT ON THIS ANALYSIS AT ALL.

16 DUKES IS A CASE THAT'S ABOUT 23(A) -- THIS IS A 23(B)(2)
17 CLASS, NOT A (B)(3) DAMAGES CLASS -- AND IT WAS A CASE ABOUT
18 COMMONALITY.

19 AND THE CASE -- THE ISSUE BEFORE THE SUPREME COURT IN
20 DUKES WAS IF THE ONLY COMMON ISSUE THE PLAINTIFFS HAVE IS THE
21 LACK OF A POLICY AND THE DISCRIMINATORY EFFECT THAT THEY SAY
22 THAT LACK OF A POLICY HAD, THAT THEY CAN PROVE THROUGH
23 STATISTICAL EVIDENCE, IF THAT IS THE ONLY COMMON ISSUE, THE
24 ONLY THING HOLDING THIS CLASS TOGETHER, THEN WE -- YOU BETTER
25 BE REALLY CONVINCING IS HOW I WOULD FRAME IT, AND THE COURT IS

1 REQUIRED TO MAKE -- I BELIEVE THE SUPREME COURT -- THE
2 DEFENDANTS USED THE PHRASE "CONVINCING PROOF" IN THEIR PAPERS.
3 I SEEM TO RECALL THE PHRASE AS "SIGNIFICANT PROOF." MAYBE BOTH
4 PHRASES ARE USED IN THE OPINION.

5 BUT IF YOU'RE IN THAT SITUATION WHERE THE ONLY EVIDENCE OF
6 A COMMON ISSUE IS THE STATISTICAL ANALYSIS SHOWING DISPARATE
7 IMPACT, THEN YOU ARE REQUIRED TO HAVE -- TO MAKE A SHOWING THE
8 SUPREME COURT CALLS CONVINCING PROOF.

9 IN AN ANTITRUST CASE, A SECTION 1 ANTITRUST CASE IS
10 FUNDAMENTALLY DIFFERENT. I MEAN, THE LAW GOING BACK 50 YEARS
11 SAYS THAT THE VIOLATION IS THE GLUE, THAT THAT IS THE COMMON
12 ISSUE.

13 THAT'S WHY, IN ANTITRUST CASES, YOU SPEND ABOUT 30 SECONDS
14 IN THE BRIEFING TALKING ABOUT 23(A) IF IT'S A SECTION 1
15 AGREEMENTS CASE BECAUSE THERE'S JUST NO DOUBT THAT THE
16 VIOLATION IS COMMON, THAT YOU'VE MET THAT REQUIREMENT OF 23(A).
17 YOU HAVE A PRETTY IMPORTANT COMMON ISSUE THAT IS THE GLUE THAT
18 MAKES THE CLASS COHESIVE. IT IS COMMON TO EVERY CLASS MEMBER.

19 SO THEN YOU GO TO THE 23 (B)(3) ANALYSIS, WHICH IS NOT THE
20 SUBJECT OF DUKES. THERE WAS NO 23 (B)(3) CLASS IN DUKES.

21 AND THERE, AGAIN, THE LAW GOING BACK TIME IMMEMORIAL IS
22 PRETTY CLEAR THAT THE VIOLATION ITSELF, PUTTING ALL ELSE ASIDE,
23 CAN BE A REASON TO CERTIFY A CLASS. YOU CAN CERTIFY A CLASS
24 JUST BASED ON THE VIOLATION AND HAVE -- EVEN IF THERE ARE
25 INDIVIDUALIZED ISSUES, IF YOU MEET THE OTHER REQUIREMENTS THAT

1 CLASS RELIEF IS STILL SUPERIOR.

2 SO I WOULD SAY THAT WHEN YOU GET TO -- IN AN ANTITRUST
3 CASE, BY THE TIME YOU GET TO THE CONVERSATION WE'RE HAVING NOW
4 ABOUT IMPACT, THERE'S A PRETTY BIG THUMB ON THE SCALE IN FAVOR
5 OF CLASS CERTIFICATION, AND THAT IS A LOGICAL RESULT OF THE
6 NATURE OF THE CASE UNDER RULE 23.

7 SO BACK TO JUDGE ILLSTON. I MEAN, THE REASON THAT WE
8 CITED THAT CASE SO MUCH, BESIDES FAMILIARITY WITH IT, IS
9 THAT -- I MEAN, THERE ARE MANY GOOD CLASS CERTIFICATION
10 DECISIONS IN THE NORTHERN DISTRICT THAT WE'VE CITED AND I WOULD
11 SAY THAT ALL OF THOSE JUDGES DID A FINE JOB.

12 BUT I FELT -- WE BELIEVE THAT JUDGE ILLSTON'S OPINION
13 THERE IS PARTICULARLY COMPREHENSIVE AND THAT THE ISSUES THAT
14 ONE -- THAT -- THE ANALYSIS THAT THE COURT SHOULD GO THROUGH
15 AND THE ISSUES THAT ARE COMMONLY RAISED IN THESE CASES ARE --
16 WERE VERY WELL VENTILATED THERE AND CONSIDERED BY HER.

17 AND SO WE THINK IT'S AN EXCELLENT, AN EXCELLENT ROAD MAP,
18 IF YOU WILL, OF WHAT THE COURT IS SUPPOSED TO DO HERE, WHICH IS
19 LOOK AT EVERY ISSUE AND SAY, IS IT INDIVIDUAL OR IS IT COMMON?
20 PUT THE COMMON ISSUES ON ONE SIDE OF THE LEDGER, PUT THE
21 INDIVIDUAL ISSUES ON THE OTHER SIDE OF THE LEDGER, IF ANY, AND
22 THEN MAKE A JUDGMENT AS TO WHETHER OR NOT THE INDIVIDUAL ISSUES
23 PREDOMINATE.

24 THE COURT: CAN YOU WALK ME THROUGH -- THIS IS IN
25 DR. LEAMER'S EXPERT REPORT IN SUPPORT OF THE MOTION -- WALK ME

1 THROUGH FIGURES 13 THROUGH 22 AND WHAT EXACTLY THEY SHOW AND
2 WHAT THEY REPRESENT. THAT WOULD JUST BE HELPFUL --

3 MR. GLACKIN: CERTAINLY, YOUR HONOR.

4 THE COURT: -- TO KNOW WHETHER THESE ARE JUST
5 HYPOTHETICALS, ARE THESE ACTUAL DATA THAT'S BEEN AGGREGATED AND
6 THEN AVERAGED? OR WHAT -- WHAT THESE ARE.

7 MR. GLACKIN: YOU COULD GUIDE ME ALONG IF YOU TOLD
8 ME WHAT PAGE FIGURE 13 IS ON.

9 THE COURT: SURE. PAGE 57.

10 MR. GLACKIN: PAGE 57.

11 THE COURT: OR IF YOU WANT TO START WITH 15, WHICH
12 IS ON PAGE 59, OR 20, WHICH IS ON PAGE 66. I MEAN, IT --
13 HOWEVER YOU FIND IT EASIER TO EXPLAIN WHAT THEY REPRESENT.

14 MR. GLACKIN: SURE, AND I THINK THIS IS AN EXCELLENT
15 THING TO DO.

16 THE COURT: OKAY.

17 MR. GLACKIN: SO LET'S ACTUALLY GO BACK TO 12 AND
18 13, BECAUSE THE SIGNIFICANCE OF WHAT COMES OUT OF 15 AND 16
19 DEPENDS ON UNDERSTANDING 12, 13, AND 14.

20 THE COURT: OKAY.

21 MR. GLACKIN: SO 12, 13, AND 14 ARE -- EXCUSE ME,
22 AND ACTUALLY GOING BACK TO 11 I WOULD SAY -- ARE -- REPRESENT
23 THE RESULTS OF THE CORRELATION ANALYSIS.

24 AND THIS, JUST TO BE COMPLETELY CLEAR, IS NOT AN AVERAGED
25 EXERCISE. THIS IS AN EXERCISE THAT'S PERFORMED ON THE ENTIRE

1 DATA SET, AND THE QUESTION THAT DR. LEAMER IS ASKING IS, TO
2 WHAT EXTENT DO A SET OF COMMON OBJECTIVE FACTORS THAT WE CAN
3 IDENTIFY IN THE DATA EXPLAIN THE COMPENSATION OF CLASS MEMBERS?

4 AND THE REASON WE ASKED THE QUESTION IS, IF THE
5 COMPENSATION OF CLASS MEMBERS IS NOT WELL EXPLAINED BY COMMON
6 OBJECTIVE FACTORS, THEN WE WOULD HAVE A REASON TO BELIEVE THAT
7 OUR HYPOTHESIS OF A PAY STRUCTURE IS FALSE.

8 SO HE ASKED THE QUESTION, AND YOU SEE ON 11 YOU HAVE, I
9 WOULD SAY, THE SORT OF HIGH LEVEL RESULTS. AND THE R SQUARE
10 NUMBER, AND I'M -- I BELIEVE -- I HOPE I'M GOING TO GET THIS
11 RIGHT -- IT SAYS THIS IS THE PERCENTAGE OF -- THIS IS AN
12 AVERAGE. THIS IS THE AVERAGE PERCENTAGE OF COMPENSATION THAT
13 IS EXPLAINED FOR THAT YEAR AT THESE DEFENDANT FIRMS BY THESE
14 COMMON OBJECTIVE FACTORS.

15 THE COURT: SO DR. LEAMER TOOK ALL OF THE DATA FOR
16 ALL EMPLOYEES OF ALL DEFENDANTS AND THEN DID AN ANALYSIS TO
17 DETERMINE HOW MUCH OF THE PAY DIFFERENTIAL IS DETERMINED BY
18 AGE, FOR EXAMPLE, OR BY TENURE AT THE COMPANY. IS THAT RIGHT?

19 MR. GLACKIN: EXACTLY, HOW MUCH OF IT IS DETERMINED
20 BY THESE SIX FACTORS TOGETHER, AND ALSO HOW MUCH OF IT IS
21 DETERMINED BY THEM INDIVIDUALLY, CORRECT.

22 AND WHAT WE FIND IS, UNSURPRISINGLY -- AND DR. MURPHY, I
23 THINK, FOUND THIS, TOO -- IS THAT JOB TITLE IS FAR AND AWAY THE
24 MOST IMPORTANT FACTOR, WHICH IS TOTALLY UNSURPRISING AT
25 COMPANIES THAT PAY PEOPLE WITHIN SALARY RANGES ACCORDING TO JOB

1 TITLES, WHICH IS WHAT WE HAVE REASON TO BELIEVE HAPPENED HERE.

2 SO THAT'S -- THAT'S WHAT 12 -- THAT'S WHAT 11, 12, 13, AND
3 14 ARE ABOUT.

4 AND THEN IF YOU LOOK AT 14 --

5 THE COURT: NOW, TITLE INDICATORS, IT JUST SAYS YES.
6 IT DOESN'T SAY HOW MUCH OF A DIFFERENTIAL IT MADE IN TERMS OF
7 COMPENSATION.

8 MR. GLACKIN: YES. I THINK WHAT THAT -- EXCUSE ME.
9 I MIGHT ACTUALLY BE -- IT'S POSSIBLE THAT I'M MISINTERPRETING
10 THAT COLUMN ESTIMATE.

11 BUT WHAT TITLE -- WHAT I READ TITLE INDICATORS THERE TO
12 MEAN IS THAT TITLE INDICATORS ARE INCLUDED IN THE ANALYSIS,
13 WHICH IS TRUE.

14 THE COURT: OKAY. SO THEN THIS IS JUST LOOKING AT
15 THE DIFFERENCE THAT AGE, TENURE AT THE COMPANY, AND GENDER
16 MAKE? IT'S ONLY LOOKING AT THOSE THREE VARIABLES?

17 MR. MITTELSTAEDT: YEAH.

18 MR. GLACKIN: RIGHT. AGE, TENURE, GENDER, LOCATION,
19 JOB TITLE, AND WHAT COMPANY IT IS.

20 THE COURT: THAT'S WHAT EMPLOYER INDICATORS MEANS?

21 MR. GLACKIN: I BELIEVE SO.

22 THE COURT: WHAT COMPANY IT IS? I GUESS I'M JUST
23 NOT CLEAR ON WHY IT DOESN'T SHOW WHAT DIFFERENCE THE TITLE
24 INDICATOR MAKES. IT JUST SAYS YES. BUT THAT'S FINE. WE CAN
25 GO ON.

1 MR. GLACKIN: SO -- AND THEN IF YOU LOOK -- AND THEN
2 ON 12, THIS INFORMATION IN FIGURE 12 IS DISAGGREGATED BY
3 DEFENDANT, RIGHT? SO YOU CAN SEE THE -- THIS FIGURE 12 SHOWS
4 THE PERCENTAGE OF EMPLOYEE COMPENSATION THAT IS EXPLAINED BY
5 THESE COMMON OBJECTIVE FACTORS IN ANY GIVEN YEAR FOR ANY GIVEN
6 DEFENDANT.

7 SO WE -- IN ADDITION TO GIVING THE COURT THE RANGE -- OR
8 EXCUSE ME -- THE AVERAGE, WHICH IS WEIGHTED BY DEFINITION
9 TOWARDS CERTAIN DEFENDANTS THAT ARE LARGER, WE ALSO WANTED TO
10 SHOW THE RANGE SO YOUR HONOR COULD SEE THE RANGE.

11 AND, I MEAN, THIS MIGHT BE A GOOD PLACE TO POINT OUT THAT
12 IN THE REED CASE ON WHICH MR. MITTELSTAEDT HAS RELIED
13 EXTENSIVELY, THERE WAS -- THERE WAS ALSO A CORRELATION ANALYSIS
14 DONE IN THAT CASE, AND THE EXPLANATORY VALUE OF THE CORRELATION
15 ANALYSIS IN THAT CASE WAS I THINK 48 TO 63 PERCENT.

16 IN OTHER WORDS, THE PLAINTIFFS IN THAT CASE, WHEN THEY
17 WERE TRYING TO EXPLAIN HOW NURSES ARE PAID, WHICH IS A VERY
18 DIFFERENT EXERCISE THAN WHAT WE'RE DOING HERE, COULD ONLY
19 EXPLAIN 48 TO 63 PERCENT, I THINK, OF THE SALARY, OR OF THE PAY
20 EARNED BY NURSES. AND THAT WAS A FACTOR THAT THE COURT, ONE OF
21 THE MANY FACTORS THAT THE COURT CONSIDERED IN THAT LENGTHY
22 OPINION.

23 HERE YOU CAN SEE THAT OUR RANGE IS MUCH HIGHER THAN THAT.
24 I MEAN, I'M NOT SEEING THE LOWEST FIGURE HERE. I WANT TO SAY
25 THE LOWEST FIGURE IS PROBABLY THE .77 FOR GOOGLE AT THE END IN

1 2010. OH, THERE'S A .75 ABOVE THAT, EXCUSE ME.

2 BUT IT'S QUITE CLEAR HERE, THE REASON THAT THE AVERAGE IS
3 AROUND 90 TO 95 IN EVERY YEAR IS BECAUSE FOR EVERY EMPLOYER FOR
4 EVERY YEAR WE ARE MORE OR LESS EXPLAINING IN THE BALL PARK OF
5 THAT AMOUNT OF THEIR COMPENSATION.

6 NOW, TO CORRECT ONE OTHER POSSIBLE MISCONCEPTION, THE --
7 JUST BECAUSE WE'VE ONLY EXPLAINED -- BECAUSE THE ANALYSIS ONLY
8 EXPLAINS THIS MUCH OF THE COMPENSATION, IT DOESN'T MEAN THE
9 REST OF IT IS RANDOM OR THAT IT IS ALL DISCRETIONARY. IT
10 SIMPLY MEANS WE HAVEN'T EXPLAINED IT.

11 THERE ARE OTHER COMMON OBJECTIVE FACTORS THAT, IF WE KNEW
12 THEM, WE MIGHT BE ABLE TO EXPLAIN YET MORE OF THE COMPENSATION.

13 AND ONE THAT CAME UP IN, SPECIFICALLY IN DR. LEAMER'S
14 DEPOSITION IS EDUCATION. AND, AGAIN, WE SIMPLY HAVE THE DATA
15 WE HAVE. WE DON'T HAVE EDUCATION DATA FOR ALL DEFENDANTS
16 BECAUSE THEY DON'T ALL KEEP IT, AND SO WE COULD NOT RUN A
17 CORRELATION ANALYSIS THAT WOULD INCLUDE THAT VARIABLE.

18 BUT DR. LEAMER EXPRESSED AT HIS DEPOSITION HE FELT PRETTY
19 CONFIDENT THAT IF YOU PUT EDUCATION IN THERE, YOU WOULD BE
20 EXPLAINING SOME MORE OF THE SALARIES, OR OF THE COMPENSATION.

21 SO THEN 13 AND 14 ARE THE SAME EXERCISE, BUT FOR THE
22 TECHNICAL CLASS.

23 THE COURT: WAIT. LET ME ASK YOU --

24 MR. GLACKIN: SURE.

25 THE COURT: -- SO, FOR EXAMPLE, ONE COMP IN 2001,

1 .91, DOES THAT MEAN THAT 91 PERCENT OF THE COMPENSATION IS
2 DETERMINED BY THE EMPLOYEE'S AGE, THEIR TENURE AT THE COMPANY,
3 THEIR GENDER, THE LOCATION WHERE THEY WORK, AND THEIR TITLE?

4 MR. GLACKIN: CORRECT. ON AVERAGE, YES, THAT'S WHAT
5 IT MEANS.

6 THE COURT: OKAY.

7 MR. GLACKIN: AND THAT -- AND 9 PERCENT OF IT WE
8 JUST DON'T KNOW. IT COULD BE DETERMINED BY EDUCATION. IT
9 COULD BE DETERMINED BY MANAGER DISCRETION. IT COULD BE
10 DETERMINED BY -- ONE COULD IMAGINE OTHER FACTORS, BUT WE JUST
11 DON'T KNOW.

12 THE COURT: OKAY.

13 MR. GLACKIN: AND THEN 13 AND 14 ARE THE SAME THING
14 FOR THE TECH CLASS AND THEY SHOW -- I MEAN, AGAIN, WE WERE SORT
15 OF TAKEN TO TASK ABOUT NOT ASKING THESE QUESTIONS.

16 BUT WE DID ASK THESE QUESTIONS, AND IF THE CORRELATION
17 ANALYSIS HAD SHOWED THAT IT WAS PERFORMING VERY BADLY FOR THE
18 LARGER CLASS AND PERFORMING VERY WELL FOR THE TECHNICAL CLASS,
19 THEN WE MIGHT HAVE NOT PROPOSED THE LARGER CLASS.

20 BUT IT TURNS OUT THAT THE CORRELATION ANALYSIS PERFORMS
21 PRETTY MUCH THE SAME FOR BOTH, WHICH IS NOT -- I MEAN, I DON'T
22 KNOW IF IT'S SURPRISING OR NOT, BUT IT IS WHAT IT IS. IT'S
23 TRUE.

24 SO WHAT YOU SEE FROM THIS IS THAT FOR BOTH THAT SMALLER
25 CLASS AND FOR THE CLASS OF EMPLOYEES ALL TOGETHER, THERE IS A

1 PAY STRUCTURE. THERE IS SOME KIND OF A PAY STRUCTURE HERE, AND
2 I THINK DR. MURPHY AND DR. LEAMER BOTH AGREE, FROM LOOKING AT
3 THE DATA, THAT IT'S VERY DRIVEN BY JOB TITLE.

4 THE COURT: WELL, YOU CAN'T TELL THAT BY -- YOU
5 CAN'T TELL THAT BY THESE FIGURES BECAUSE THEY DON'T GIVE YOU
6 ANY NUMERICAL ESTIMATE FOR TITLE. IT JUST SAYS YES.

7 MR. GLACKIN: THAT'S TRUE.

8 THE COURT: YOU CAN'T DISAGGREGATE AGE OF THE
9 EMPLOYEE, TENURE AT THE COMPANY, GENDER, LOCATION, AND TITLE,
10 BECAUSE THIS IS A --

11 MR. GLACKIN: THAT'S CORRECT. WE DON'T REPORT -- WE
12 DON'T REPORT THE PERCENTAGE.

13 THE COURT: SO WHAT DO THEY BASE THAT ON, THAT IT'S
14 BASED ON THE TITLE?

15 MR. GLACKIN: WHAT I AM RECALLING IS THAT DR. LEAMER
16 WAS ASKED AT HIS DEPOSITION, BY MR. PICKETT, SOMETHING ALONG
17 THE LINES OF, "WOULD IT SURPRISE YOU THAT MOST OF THIS
18 CORRELATION IS DRIVEN BY THE JOB TITLE?"

19 AND DR. LEAMER SAID, "NO, NOT AT ALL. I BELIEVE THAT'S
20 TRUE."

21 AND I THINK THAT DR. MURPHY REFERRED TO THIS IN HIS REPORT
22 AS WELL, BUT I WOULD HAVE TO CHECK.

23 THE COURT: WHY ARE THE, THE NUMBERS FOR HOW MUCH A
24 COMPENSATION IS DETERMINED BY EMPLOYEE AGE, COMPANY TENURE,
25 GENDER, LOCATION, AND TITLE PRETTY CONSISTENTLY LOWER FOR THE

1 TECHNICAL ALTERNATIVE CLASS VERSUS THE ALL EMPLOYEE CLASS?

2 MR. GLACKIN: I DON'T BELIEVE WE TRIED TO EXPLAIN
3 THAT. I DON'T KNOW THAT WE COULD.

4 THE COURT: OKAY. ALL RIGHT.

5 MR. GLACKIN: SO THAT'S THOSE FIGURES.

6 THEN YOU GO TO FIGURES 15 AND 16 AND 17 -- AND JUST FOR
7 CONTEXT'S SAKE, THESE ARE THE FIGURES THAT I THINK ARE THE
8 SUBJECT OF ALL THE SUPPLEMENTAL MATERIAL THE DEFENDANTS MOVED
9 TO ADMIT I BELIEVE LATE LAST WEEK.

10 AND WHAT THESE FIGURES SHOW IS -- SO IT SAYS CONSTANT
11 CONTRIBUTE -- EXCUSE ME -- CONSTANT ATTRIBUTE COMPENSATION OF
12 MAJOR JOB TITLES.

13 AND WHAT DR. LEAMER HERE IS DOING IS HE'S LOOKING AT THE
14 PREDICTED VALUE OF THESE JOB TITLES, PREDICTED BY THE
15 CORRELATION, WITHIN A PERSON'S COMPENSATION.

16 AND I'M PROBABLY NOT SAYING -- I'M PROBABLY NOT SAYING
17 THAT VERY WELL, BUT THE IDEA HERE IS TO ASK YOURSELF, IS THE
18 VALUE OF THE JOB TITLE CHANGING ON A YEAR TO YEAR BASIS WITHIN
19 THESE COMPANIES?

20 AND THE REASON YOU ASK THAT QUESTION -- IT ALWAYS GOES
21 BACK TO THE SCIENTIFIC METHOD. THE REASON YOU ASK THAT
22 QUESTION IS BECAUSE IF, IF IT DOES, IF IT -- IF YOU SEE SOME
23 EVIDENCE, OR IF YOU SEE A LOT OF EVIDENCE THAT IS, YOU KNOW,
24 THAT JOB TITLE COMPENSATION GOES WAY UP IN ONE YEAR AND WAY
25 DOWN IN ANOTHER YEAR AND THIS IS ALWAYS TRUE FOR JOB TITLES,

1 YOU WOULD NOT BE REASSURED THAT THE -- THAT YOU'RE REALLY
2 DETECTING A STRUCTURE HERE THAT'S DRIVEN BY JOB TITLE.

3 AND SO HE MAPS THESE -- HE CONSIDERS WHAT --

4 THE COURT: SO TELL ME, HOW IS FIGURE 15 CREATED?

5 MR. GLACKIN: THIS -- I'M TRYING TO THINK OF THE
6 BEST WAY TO EXPRESS THIS. THIS IS THE PERCENTAGE OF -- THIS IS
7 THE VALUE OF COMPENSATION, DOLLAR VALUE OF COMPENSATION FOR A
8 PARTICULAR JOB TITLE THAT IS PREDICTED BY THE REGRESSION, THE
9 CORRELATION ANALYSIS IN ANY PARTICULAR YEAR.

10 THE COURT: SO YOU'RE SAYING THAT DR. LEAMER DID
11 WHATEVER HE DID TO CALCULATE THE NUMBERS IN FIGURES 11 AND
12 13 --

13 MR. GLACKIN: UM-HUM.

14 THE COURT: -- THAT HE DID THAT AND ISOLATED TITLE
15 AS THE ONLY DEPENDENT VARIABLE?

16 MR. GLACKIN: NO, NO, NO.

17 THE COURT: HOW DID HE COME UP WITH THIS GRAPH IN
18 FIGURE 15?

19 MR. GLACKIN: SO THE -- WELL, ACTUALLY THAT MIGHT --
20 I THINK THE WORDS "DEPENDENT VARIABLE" MIGHT BE WRONG. I MEAN,
21 WHAT YOU MIGHT -- THE WAY I UNDERSTAND IT IS YOU LOOK AT THE
22 CORRELATION -- YOU LOOK AT THESE SIX FACTORS AND YOU PUT IN A
23 VALUE FOR EACH OF THE FACTORS, JOB TITLE, AGE, TENURE AT THE
24 COMPANY AND WHAT HAVE YOU, GENDER, AND THE ANALYSIS WILL SPIT
25 OUT A VALUE, OR PREDICT -- I SHOULDN'T SAY "SPIT OUT" -- IT

1 PREDICTS A DOLLAR AMOUNT OF COMPENSATION BASED ON THAT FACTOR.

2 AND THIS IS -- SO, I MEAN, HERE --

3 THE COURT: IS THIS --

4 MR. GLACKIN: SO HERE HE'S ISOLATING -- "ISOLATING"
5 IS THE RIGHT WORD -- HE'S ISOLATING WHAT YOU PREDICT JUST BASED
6 ON AN INDIVIDUAL'S JOB TITLE.

7 SO FOR HERE, IF YOU'RE LOOKING AT THE TOP LINE, WHICH IS
8 THE LIGHT PURPLE, WHICH IS SOFTWARE DEVELOPER ENGINEER 4 --
9 HOPEFULLY I GOT THE COLORS RIGHT -- THE CORRELATION ANALYSIS IS
10 PREDICTING THAT IF ALL YOU KNOW ABOUT A PERSON IS THAT THEY
11 HAVE THAT POSITION, THEY'RE MAKING \$130,000 A YEAR. YOU DON'T
12 KNOW ANYTHING ELSE ABOUT THEM. YOU JUST KNOW THAT.

13 AND THAT'S TOTAL COMPENSATION HERE, NOT SALARY.

14 THE COURT: NO. THE TOP OF FIGURE 15 IS BASE
15 SALARY.

16 MR. GLACKIN: RIGHT. AND THEN BELOW IS TOTAL COMP,
17 RIGHT.

18 THE COURT: SO WHAT WAS THIS BASED ON, THE TOTAL
19 DATA OF ALL --

20 MR. GLACKIN: RIGHT, ALL THE DATA.

21 THE COURT: NO. THIS WAS JUST APPLE. RIGHT?
22 FIGURE 15 IS JUST APPLE AND 16 IS JUST GOOGLE.

23 MR. GLACKIN: YEAH, I THINK THAT'S RIGHT. I MEAN,
24 ALL THE DATA IS IN THE SET, BUT I THINK YOU'RE BASING THAT ON
25 APPLE AND GOOGLE DATA.

1 THE COURT: SO WHAT -- I'M JUST TRYING TO FIGURE OUT
2 WHAT THESE ARE. IT'LL HELP IN THE ORDER.

3 MR. GLACKIN: SO WHAT HELPS --

4 THE COURT: THIS IS SAYING THAT -- THIS IS LOOKING
5 AT ALL OF THE BASE SALARY AND TOTAL COMPENSATION DATA OF THESE
6 TEN CATEGORIES OF JOBS AT APPLE --

7 MR. GLACKIN: UM-HUM.

8 THE COURT: -- AND PREDICTING WHAT THEIR SALARY
9 WOULD BE --

10 MR. GLACKIN: UM-HUM.

11 THE COURT: -- BASED SOLELY ON THE JOB TITLE? IS
12 THAT WHAT THIS --

13 MR. GLACKIN: THAT'S PRETTY MUCH RIGHT.

14 THE COURT: I DON'T UNDERSTAND WHAT THIS IS.

15 MR. GLACKIN: THAT'S PRETTY MUCH RIGHT. AND THE
16 SIGNIFICANCE OF THAT IS, AGAIN, THAT THE -- THIS IS, AGAIN, AN
17 EXERCISE IN ATTEMPTING TO FALSIFY, RIGHT?

18 IF -- IF THIS WERE A LOT DIFFERENT, THEN DR. LEAMER WOULD
19 BE OF THE OPINION THAT THERE -- YOU KNOW, IT WOULD BE
20 QUESTIONABLE, I GUESS. YOU'D HAVE TO MAYBE DO MORE ANALYSIS.

21 BUT YOU'D BE TROUBLED WITH YOUR CONCLUSION THAT THERE'S A
22 PAY STRUCTURE THAT PERSISTS OVER TIME THAT'S DRIVEN BY THIS
23 ADMINISTRATIVE PAY SYSTEM.

24 I MEAN, BECAUSE -- IN OTHER WORDS, WHEN YOU LOOK AT THE
25 CORRELATION ANALYSIS, YOU'RE LOOKING AT A SNAPSHOT OF A

1 PARTICULAR YEAR, AND THAT SHOWS A STRUCTURE. IT DOES SHOW A
2 STRUCTURE.

3 BUT YOU ALSO WANT TO ASK YOURSELF IF THAT, IF THOSE
4 CORRELATIONS ARE HOLDING OVER TIME, BECAUSE IF THEY AREN'T, YOU
5 MIGHT HAVE TO DO SOME INVESTIGATION TO UNDERSTAND WHY THEY'RE
6 NOT.

7 THE COURT: SO WHAT DOES YOUR THEORY REQUIRE BE
8 SHOWN IN FIGURE 15? THAT ALL OF THESE DIFFERENT CATEGORIES OF
9 TECHNICAL JOBS AT APPLE ARE GENERALLY INCREASING OR DECREASING
10 TOGETHER?

11 MR. GLACKIN: NO.

12 THE COURT: WHAT DOES YOUR THEORY REQUIRE?

13 MR. GLACKIN: IT ABSOLUTELY DOESN'T. I DON'T
14 ACTUALLY THINK THAT -- I DON'T THINK THAT THE THEORY REQUIRES
15 THAT THESE LOOK A PARTICULAR WAY, OTHER THAN THEY NOT BE A
16 COMPLETE MISHMASH, I GUESS.

17 THE COURT: WELL, DOESN'T YOUR INTERNAL EQUITY
18 THEORY REQUIRE THAT THEY SOMEWHAT RISE OR FALL TOGETHER?
19 OTHERWISE YOU'RE GOING TO HAVE RESENTMENT, JEALOUSLY,
20 DISCONTENTMENT, PEOPLE START LEAVING?

21 MR. GLACKIN: NO, ABSOLUTELY NOT. AND THE REASON
22 FOR THAT IS THAT INTERNAL EQUITY IS -- AND WE'VE NEVER SAID
23 THIS, BY THE WAY. INTERNAL EQUITY IS NOT THE ONLY FACTOR THAT
24 DRIVES EMPLOYEE COMPENSATION. IT IS SIMPLY A FACTOR THAT
25 DRIVES EMPLOYEE COMPENSATION.

1 SO PEOPLE -- I'M SORRY. I DIDN'T MEAN TO INTERRUPT YOU.

2 THE COURT: WELL, I GUESS I'M JUST NOT -- I'M NOT
3 CLEAR ON WHAT THIS IS SHOWING, BASE SALARY VERSUS TOTAL
4 COMPENSATION, BROKEN DOWN BY TEN DIFFERENT ENGINEERING JOBS AT
5 TWO COMPANIES. WHAT IS FIGURE 15 AND 16 SUPPOSED TO CONVEY?

6 MR. GLACKIN: WHAT IT'S SUPPOSED TO CONVEY IS THAT
7 THE -- THE INDIVIDUAL STRUCTURE THAT'S BEEN SHOWN IN EVERY YEAR
8 BY THE CORRELATION ANALYSIS, WHICH IS FIGURES 11 THROUGH 14,
9 IS -- APPEARS TO BE PERSISTENT, MORE OR LESS, OVER TIME.

10 AND IT'S NOT -- IT'S NOT RANDOMLY RESETTING EVERY YEAR,
11 WHICH OF COURSE THERE'S NO EVIDENCE OF IN THE RECORD, RIGHT?
12 THEY DON'T DO A COMPLETE REBOOT OF THEIR PAY SYSTEM EVERY 12
13 MONTHS.

14 THE COURT: AND WHAT DOES THAT MEAN? THAT YOUR JOB
15 TITLE IS LARGELY GOING TO DETERMINE YOUR COMPENSATION IN A
16 GIVEN YEAR?

17 MR. GLACKIN: YEAH, AND IN FUTURE YEARS.

18 THE COURT: I GUESS I JUST DON'T SEE THE
19 RELATIONSHIP OF THAT WITH THE PLAINTIFFS' OVERALL THEORY.

20 MR. GLACKIN: WELL, AGAIN, IT'S JUST TO -- I MEAN,
21 AT THIS POINT WE'RE REALLY CONFIRMING SOMETHING THAT WE HAD NO
22 REASON TO DOUBT TO BEGIN WITH, WHICH IS THAT THESE COMPANIES
23 HAVE ADMINISTRATIVE PAY SYSTEMS THAT PAY PEOPLE ACCORDING TO A
24 STRUCTURE.

25 I MEAN, LET ME POSIT -- MAYBE I CAN EXPLAIN THIS BETTER.

1 LET'S SAY YOU HAVE RUN THE CORRELATION ANALYSIS FOR DIFFERENT
2 YEARS, AND EVERY YEAR YOU'RE SHOWING THAT 95 PERCENT OF --
3 YOU'RE EXPLAINING 95 PERCENT OF COMPENSATION BASED ON SIX
4 FACTORS, OKAY? THAT LOOKS GREAT. THAT LOOKS LIKE A STRUCTURE.

5 BUT WHAT IF, WHAT IF, IN 2001, JOB TITLE IS DRIVING 90
6 PERCENT OF IT AND, IN 2002, GENDER IS DRIVING 90 PERCENT OF IT
7 AND JOB TITLE IS ONLY DRIVING 10 PERCENT OF IT?

8 WELL, YOU'RE STILL EXPLAINING 90 PERCENT, BUT YOUR THEORY
9 OF A STRUCTURE IS QUESTIONABLE, TO SAY THE LEAST, UNDER THOSE
10 CIRCUMSTANCES.

11 AND WHAT THIS IS SHOWING IS THAT THAT DIDN'T HAPPEN, THAT
12 JOB TITLE CONTINUED TO BE IMPORTANT EVERY YEAR, AND THAT THE
13 SYSTEM WASN'T REBOOTING SO THAT IT WAS JOB TITLE ONE YEAR,
14 GENDER ANOTHER YEAR, AND THEN THE THIRD YEAR, THEY THREW THE
15 JOB TITLE BOOK OUT AND THEY JUST PAID PEOPLE BASED ON HOW LONG
16 THEY'D BEEN AT THE COMPANY, YOU GOT 50 GRAND FOR EVERY YEAR OF
17 SERVICE.

18 THAT DIDN'T HAPPEN. WE KNOW AS A FACTUAL MATTER THAT THAT
19 DIDN'T HAPPEN, AND THIS SIMPLY CONFIRMS THAT IT DIDN'T HAPPEN.

20 THE COURT: OKAY. SO WHAT IS THE RELATIONSHIP
21 BETWEEN THE THEORY THAT AN EMPLOYEE'S SALARY IS LARGELY
22 DETERMINED BY THEIR TITLE --

23 MR. GLACKIN: UM-HUM.

24 THE COURT: -- WHAT DOES THAT HAVE TO DO WITH YOUR
25 THEORY OF THIS CASE?

1 MR. GLACKIN: WELL, WHAT IT HAS TO DO WITH IS THE
2 OPERATION OF INTERNAL EQUITY DOES REQUIRE SOME KIND OF A PAY
3 STRUCTURE AND -- THAT IS COMPANY-WIDE. I MEAN, THERE HAS TO
4 BE -- I MEAN, AGAIN, TO BEGIN WITH, WE START FROM THE PREMISE
5 THAT INTERNAL EQUITY IS WIDELY ACCEPTED -- EXCUSE ME -- IT'S
6 TAUGHT IN PERSONNEL HANDBOOKS. IT'S TAUGHT IN PERSONNEL
7 TEXTBOOKS. IT'S NOT A CONTROVERSIAL PROPOSITION.

8 SO NOW WE'RE ASKING, WAS INTERNAL -- IS IT REASONABLE TO
9 BELIEVE THAT INTERNAL EQUITY AFFECTED COMPENSATION AT THESE
10 COMPANIES?

11 WELL, ONE THING THAT WOULD GIVE YOU A LOT OF PAUSE IS IF
12 THERE WAS NO STRUCTURE TO HOW THESE COMPANIES PAID THEIR
13 EMPLOYEES -- AND THIS WOULD BE IF THERE WAS NO SYSTEM OR
14 STRUCTURE, BECAUSE IF PAY IS NOT BEING CENTRALIZED AT THESE
15 COMPANIES IN ANY WAY, IT WOULD BE HARD FOR INTERNAL EQUITY TO
16 HAVE A SHARING EFFECT ACROSS THE ENTIRE FIRM.

17 SO THAT IS WHY WE'VE TRIED TO VERIFY HERE WHAT WE KNOW IS
18 TRUE, WHICH IS THAT THE COMPANIES HAVE ADMINISTRATIVE -- THEY
19 HAVE CENTRALIZED, ADMINISTRATIVE PAY SYSTEMS BY WHICH THEY SET
20 COMPENSATION FOR THE ENTIRE FIRM, AND THAT IS A VERY -- THAT
21 STRUCTURE IS A VERY IMPORTANT PART OF HOW THEY SET
22 COMPENSATION.

23 THE COURT: WELL, THAT SEEMS TO BE SOMEWHAT TRUE FOR
24 BASE SALARY, BUT DOESN'T SEEM TO REFLECT TOTAL COMPENSATION,
25 WHICH I WOULD ASSUME INCLUDES, YOU KNOW, STOCK OPTIONS AND

1 BONUSES. THERE'S A LOT MORE DEVIATION GOING ON IN TOTAL
2 COMPENSATION. SO HOW DO YOU --

3 MR. GLACKIN: WELL, YEAH.

4 THE COURT: SO HOW DO YOU EXPLAIN THAT, THAT YOUR
5 SORT OF MORE LOCKSTEP INTERNAL EQUITY THEORY MIGHT APPLY TO THE
6 BASE, BUT IT'S NOT GOING TO ACCOUNT FOR THE OTHER FACTORS THAT
7 MAKE UP SOMEONE'S TOTAL COMPENSATION?

8 MR. GLACKIN: SO I GUESS WHAT I WOULD SAY IS THAT --
9 FIRST OF ALL, I MEAN, YOU CAN CERTAINLY IMAGINE A WORLD IN
10 WHICH THE EFFECTS OF THIS -- THE EFFECTS OF THE INCREASED
11 COMPETITION WOULD HAVE BEEN SHARED SIMPLY THROUGH BASE
12 SALARIES. I MEAN, IT'S NOT HARD TO IMAGINE THAT WORLD. IT'S
13 CERTAINLY POSSIBLE.

14 BUT I DON'T THINK THAT THE FACT THAT THE TOTAL
15 COMPENSATION LINES SHOW MORE VARIABILITY IS A PROBLEM. I MEAN,
16 THERE'S -- INTERNAL EQUITY DOESN'T MEAN EQUALITY. IT DOESN'T
17 MEAN EVERYBODY IS ALWAYS GOING TO GET A RAISE AT THE SAME TIME.
18 IT DOESN'T MEAN THAT EVERYONE IS GOING TO GET A PAY CUT AT THE
19 SAME TIME.

20 WHAT IT MEANS IS THAT IF SOMEONE, SOMEONE OR SOME GROUP
21 GETS A RAISE, THERE WILL BE AN INCREMENTAL BENEFIT TO OTHER
22 MEMBERS OF THAT COMPANY'S WORK FORCE BECAUSE OF THE GAINS --
23 CAUSED BY THE GAINS MADE BY THAT PERSON OR THAT GROUP.

24 SO OTHER PEOPLE WHO ARE GETTING A PAY CUT MIGHT GET LESS
25 OF A PAY CUT BECAUSE THERE MIGHT BE A BIGGER COMPENSATION

1 BUDGET.

2 IT DOESN'T REQUIRE THAT, AT ALL, THAT COMPENSATION MOVE IN
3 LOCKSTEP, AND COMPENSATION AT THESE COMPANIES DOES NOT MOVE IN
4 LOCKSTEP.

5 THE COURT: SO WHAT -- WHY DON'T YOU EXPLAIN HOW THE
6 SECOND GRAPH OF FIGURE 16 STILL SUPPORTS YOUR INTERNAL EQUITY
7 THEORY.

8 MR. GLACKIN: SO I GUESS -- I MEAN, DR. LEAMER --
9 I'M GOING TO REFER TO HIS TESTIMONY, BECAUSE I FEEL LIKE HE
10 SHOULD BE THE ONE EXPLAINING IT.

11 THE COURT: UM-HUM.

12 MR. GLACKIN: AND HE TESTIFIED ABOUT THIS SPECIFIC
13 FIGURE AND HE SAID THAT, YOU KNOW, THAT THIS IS -- I MEAN, IT'S
14 NORMAL -- I REALLY OUGHT TO LOOK AT HIS TESTIMONY. MY
15 RECOLLECTION IS HE SAID THAT IT'S OKAY FOR THERE TO BE SOME
16 OUTLIERS. I MEAN, IT'S ALL RIGHT. IT'S OKAY FOR A GROUP OR A
17 JOB TITLE TO GET A BIG BUMP IN A PARTICULAR YEAR.

18 THE COURT: BUT WHAT DOES THAT DO FOR INTERNAL
19 EQUITY? DON'T THE REST OF THE FOLKS GET JEALOUS, RESENTFUL,
20 DISCONTENT?

21 MR. GLACKIN: THE POINT IS THAT THEY DON'T HAVE TO
22 GET THE SAME -- THEY DON'T HAVE TO GET THE SAME BUMP IN ORDER
23 TO NOT FEEL THAT WAY.

24 FOR EXAMPLE, IF -- YOU COULD GIVE ONE GROUP OF EMPLOYEES A
25 PAY RAISE AND GIVE OTHER GROUPS OF EMPLOYEES A SMALLER PAY

1 RAISE AND YOU COULD -- YOU KNOW, BECAUSE IT'S NOT -- WE'RE NOT
2 THE SOVIET UNION AND WE'RE NOT POSTULATING THAT THESE COMPANIES
3 ARE THE SOVIET UNION. WE'RE NOT SAYING THAT THIS IS A
4 COMMUNIST REGIME WHERE EVERYONE HAS AN EXPECTATION THAT THEY'RE
5 GOING TO BE PAID THE SAME AMOUNT AS THEIR COMRADE.

6 BUT PEOPLE DO CARE ABOUT BEING PAID FAIRLY AND THEY DO
7 BELIEVE IF SOMEONE ELSE IS GETTING SOME GAINS, THEY SHOULD
8 SHARE IN THAT A LITTLE BIT.

9 THE COURT: SO WHY SHOULDN'T THEY GENERALLY RISE AND
10 FALL TOGETHER, EVEN IF THERE MIGHT BE SLIGHT DEVIATIONS? WHY
11 SHOULDN'T THEY ALL RISE AND FALL TOGETHER UNDER YOUR THEORY?

12 MR. GLACKIN: BECAUSE THERE ARE OTHER FACTORS THAT
13 AFFECT COMPENSATION.

14 AND WE'VE NEVER SAID THAT THIS -- THAT THESE AGREEMENTS OR
15 THAT COMPETITION AMONG THESE DEFENDANTS FOR WORKERS OR THAT
16 INTERNAL EQUITY ARE THE ONLY FACTORS THAT AFFECT COMPENSATION.

17 IT -- WE WOULD SAY THAT THERE IS -- THAT THERE ARE -- THAT
18 OTHER FORCES ARE GOING TO CONTINUE TO MOVE SALARIES AROUND, BUT
19 THAT THERE WILL BE -- IF ONE GROUP, IN THIS GREEN LINE HERE, IF
20 THEY GET A BIG BUMP IN ONE YEAR, THAT THAT IS GOING TO BE
21 SHARED, THAT THEY ARE NOT THE ONLY GROUP THAT IS GOING TO DO
22 BETTER THAT YEAR THAN THEY WOULD HAVE.

23 AND, AGAIN, THE THING TO REMEMBER HERE IS WE'RE TALKING
24 ABOUT A BUT-FOR WORLD THAT NEVER HAPPENED WHERE THERE WAS
25 INCREASED COMPETITION, AND WE'RE SAYING THAT IN THAT WORLD, IF

1 INCREASED COMPETITION CAUSED -- NOW, WE'RE NOT SAYING INCREASED
2 COMPETITION CAUSED THAT BUMP, RIGHT, BECAUSE THIS IS 2007 IN
3 THE MIDDLE OF THE AGREEMENTS.

4 BUT WE'RE SAYING IF INCREASED COMPETITION HAD CAUSED A
5 BUMP LIKE THAT FOR A JOB TITLE OR FOR A SMALL GROUP OF PEOPLE,
6 YOU WOULD EXPECT, UNDER INTERNAL EQUITY, THAT SOME -- THAT
7 OTHER PEOPLE IN THE SAME WORK FORCE WOULD SEE SOME GAINS AS
8 WELL.

9 THE COURT: WHY DID DR. LEAMER USE AVERAGED
10 COMPENSATION NUMBERS TO CREATE THESE CHARTS IN FIGURES 15, 16,
11 AND 17?

12 MR. GLACKIN: SO BECAUSE I THINK -- WELL, HE'S NOT
13 BEEN ASKED THAT QUESTION.

14 I WOULD SAY THAT WHEN YOU'RE TRYING TO ISOLATE THE
15 RELATIONSHIP THIS WAY, THAT THE MOST DESCRIPTIVE WAY TO DO THAT
16 IS TO USE AN AVERAGE.

17 THERE'S BEEN SOME TALK IN THIS CASE LIKE AVERAGING IS A
18 DIRTY TERM. IT'S NOT. IT'S ONE OF THE MOST FUNDAMENTAL
19 MATHEMATICAL PROCESSES, AND IT'S -- THERE ARE CERTAIN KINDS OF
20 DATA ANALYSIS THAT SIMPLY CAN'T BE DONE WITHOUT AVERAGING.
21 IT'S A FUNDAMENTAL WAY TO COMPARE DATA SETS TO ONE ANOTHER.

22 SO I THINK THAT YOU WOULD USE AVERAGING HERE FOR THE SAME
23 REASON YOU WOULD USE IT ANYWHERE, WHICH IS THAT WHEN YOU'RE
24 TRYING TO DISPLAY IN A WAY THAT'S EASY FOR SOMEONE LOOKING AT
25 IT TO SEE THE RELATIONSHIP OVER TIME, THAT AVERAGING IS USEFUL

1 FOR THAT PURPOSE.

2 YOU KNOW, DR. LEAMER TESTIFIED TO THIS AT HIS DEPO BECAUSE
3 HE WAS ASKED, I THINK, PRETTY MUCH THE SAME QUESTION AND HE
4 SAID, "YOU KNOW, WHEN I -- WHEN I TEACH STUDENTS ECONOMETRICS,
5 I SHOW THEM A CHART FULL OF NUMBERS AND THEN I SHOW THEM A
6 GRAPH WITH A LINE THAT REPRESENTS THOSE NUMBERS AND I SAY, WHEN
7 YOU LOOK AT THAT LINE, OR THAT CURVE OR WHATEVER IT IS, YOU ARE
8 SEEING WHAT YOU NEED TO SEE."

9 IT'S MORE USEFUL, IT'S MORE INFORMATIVE THAN LOOKING AT A
10 CHART FULL OF NUMBERS.

11 THE COURT: AND IS IT THE PLAINTIFFS' POSITION THAT
12 THESE ARE REPRESENTATIVE OF HOW THE REST OF THE CLASS'S
13 ANALYSIS WOULD SIMILARLY COME OUT? OR -- I KNOW THE DEFENDANTS
14 MADE A LOT OF THE FACT THAT THESE ARE JUST SORT OF TEN LIMITED
15 TITLES AT TWO OF THE MULTIPLE DEFENDANTS HERE.

16 MR. GLACKIN: SO LET ME -- AND I APOLOGIZE, I NEED
17 TO STEP BACK A MINUTE AND MAKE ONE CORRECTION, WHICH IS, AGAIN,
18 THESE ARE NOT, STRICTLY SPEAKING, AVERAGES.

19 WHAT THEY ARE IS THE PREDICTED -- THE DOLLAR VALUE THAT'S
20 PREDICTED BY THE REGRESSION BASED ON AN AGGREGATE DATA SET.

21 IT'S NOT -- BUT IT'S -- BUT "AVERAGE" IS AN OKAY TERM TO
22 USE. I MEAN, IT'S CLOSE ENOUGH, I GUESS. IT IS DEFINITELY A
23 REPRESENTATION OF AGGREGATE DATA USING ONE LINE, SO IT'S AN
24 AVERAGE KIND OF IN THAT SENSE.

25 SO WHAT WOULD WE SAY ABOUT THE REST OF THE DATA?

1 WELL, I THINK -- AGAIN, I MEAN, THE PURPOSE HERE WAS TO,
2 WAS TO ATTEMPT TO FALSIFY, AND SO DR. LEAMER DID NOT DO THIS --
3 I MEAN, HE CERTAINLY HASN'T SHOWN US EVERY JOB TITLE. HE'S
4 SHOWN US AN ILLUSTRATION --

5 THE COURT: YOU KEEP SAYING "FALSIFY." I DON'T
6 UNDERSTAND THE CONTEXT IN WHICH YOU'RE USING THAT WORD.

7 MR. GLACKIN: SURE, OKAY. WELL, THIS IS ONE OF MY
8 FAVORITE TOPICS.

9 THE COURT: OKAY. KEEP IT SHORT THEN.

10 MR. GLACKIN: WELL --

11 (LAUGHTER.)

12 MR. GLACKIN: I'LL TRY. I'LL REALLY TRY.

13 SO THE CONCEPT OF FALSIFICATION IS CRUCIAL TO THE
14 SCIENTIFIC METHOD. IN SCIENCE IN GENERAL, AND IN SOCIAL
15 SCIENCE IN PARTICULAR, IT'S VERY HARD TO CONCLUSIVELY PROVE
16 ANYTHING EMPIRICALLY, AND IN ECONOMICS, IT'S PRETTY MUCH
17 IMPOSSIBLE.

18 WHAT YOU CAN DO IS YOU CAN PROPOSE A THEORY AND THEN YOU
19 CAN TEST IT, AND IF YOUR THEORY DOESN'T FAIL, THAT IS
20 INFERENTIAL SUPPORT THAT YOUR THEORY IS VALID. THAT'S HOW A
21 HYPOTHETICAL BECOMES A THEORY UNDER THE SCIENTIFIC METHOD.

22 AND SO WHAT DR. LEAMER IS DOING HERE IS HE'S SAYING,
23 "HERE'S AN EXAMPLE OF ME ASKING MYSELF IF I'M WRONG. I LOOK AT
24 THESE CHARTS AND I DON'T NEED THEM TO COME OUT A PARTICULAR
25 WAY. I DON'T NEED THE LINES TO BE IN A PARTICULAR PLACE.

1 "BUT THESE CHARTS TELL ME THAT MY CORRELATION ANALYSIS
2 DOESN'T HAVE THIS MAJOR PROBLEM, WHICH IS THIS YEARLY RESET
3 SORT OF HYPOTHETICAL, THAT I WAS AFRAID OF.

4 "AND SO, THEREFORE, THAT MAJOR PROBLEM NOT BEING THERE, I
5 AM MORE CONFIDENT IN MY CORRELATION ANALYSIS, WHICH I AM
6 OTHERWISE CONFIDENT IN."

7 THE COURT: BUT HOW CAN WE EXTRAPOLATE FROM THESE
8 TEN JOB TITLES AT TWO DEFENDANTS THAT THAT WOULD SIMILARLY BE
9 REFLECTED IF THE SAME ANALYSIS WAS DONE FOR ALL THE OTHER JOB
10 TITLES IN THE ALL EMPLOYEE CLASS FOR ALL DEFENDANTS?

11 MR. GLACKIN: WELL, I GUESS WHAT I WOULD SAY IS
12 THAT -- I MEAN, THERE'S -- THERE'S 500 -- THERE'S 100,000
13 EMPLOYEES. THERE'S 500,000 OBSERVATIONS.

14 YOU CANNOT CONCLUDE, FROM LOOKING AT THESE, THAT THE
15 ANSWER WOULD BE THE SAME IN EVERY CASE. I'D AGREE WITH THAT.
16 IT DOESN'T SAY THAT.

17 THIS IS A -- THIS IS A TEST FOR CLASS CERTIFICATION
18 PURPOSES. THIS SHOWS DR. LEAMER ASKING HIMSELF IF THIS MAJOR
19 FLAW EXISTS IN HIS MODEL. HE DOESN'T SEE IT, SO WE MOVE ON.

20 THE COURT: WHAT ABOUT 20 AND 22, PLEASE? WHAT --
21 I'M UNCLEAR ON WHAT --

22 MR. GLACKIN: I WILL SAY, IF I CAN JUST POINT ONE
23 THING OUT, THOUGH, WHICH IS THAT -- I MEAN, THESE WERE AT APPLE
24 AND GOOGLE. THEY WERE MAJOR TITLES -- AND I BELIEVE THIS WAS
25 ASKED ABOUT AT DR. LEAMER'S DEPOSITION -- THESE WERE TITLES FOR

1 WHICH THERE WERE A LOT OF OBSERVATIONS. WE DIDN'T PICK A BUNCH
2 OF PEOPLE THAT -- A BUNCH OF TITLES THAT WERE INCONSEQUENTIAL
3 TO THE COMPANY I GUESS IS WHAT I WOULD SAY.

4 THE COURT: LET ME ASK, WITH YOUR 100,000 ALL
5 EMPLOYEE CLASS, AND WITH 60,000 IN THE TECHNICAL ALTERNATIVE
6 CLASS -- NEVER MIND. I'LL STRIKE THAT QUESTION.

7 MR. GLACKIN: OKAY.

8 THE COURT: LET'S GO AHEAD. SO WHAT ELSE CAN YOU
9 TELL ME ABOUT FIGURES 20 AND 22?

10 MR. GLACKIN: OKAY. SO NOW WE ARE AT THE, AT WHAT'S
11 BEEN SOMEHOW -- SOMEBODY CALLED THIS THE CONDUCT REGRESSION AND
12 THAT STUCK AND SO PEOPLE CALL IT THE CONDUCT REGRESSION, AND
13 THIS IS THE REGRESSION ANALYSIS -- THE CORRELATION ANALYSIS WE
14 DISCUSSED IS ALSO A REGRESSION. THIS IS THE REGRESSION THAT
15 INCLUDES DEPENDENT VARIABLES, A DEPENDENT VARIABLE, AND
16 ATTEMPTS TO ESTIMATE THE EFFECT OF THE ANTICOMPETITIVE
17 AGREEMENTS.

18 I WILL TELL YOU AS MUCH AS I CAN ABOUT THE REGRESSION
19 OUTPUTS.

20 SO IF YOU LOOK AT FIGURE 20, THIS IS THE REGRESSION OUTPUT
21 FOR THE ALL SALARY CLASS. AND WHAT THAT MEANS IS YOU PUT THE
22 DATA IN, YOU WRITE CODE IN STATA, I THINK THEY -- I DON'T KNOW
23 WHICH OF THE TWO PROGRAMS THEY USE, BUT STATA IS COMMON -- YOU
24 HIT ENTER, AND IT ESTIMATES THESE COEFFICIENTS FOR THESE
25 DIFFERENT VARIABLES.

1 AND THE CONDUCT IS AT 1 THROUGH 4. I BELIEVE THAT'S
2 WHAT'S BEING ESTIMATED.

3 AND THEN THE VARIABLES BELOW THAT ARE THE VARIABLES THAT
4 ARE DOING THE ESTIMATING. HOPEFULLY I GOT THAT RIGHT.

5 THE COURT: WELL, I JUST DON'T KNOW WHAT -- IS THIS
6 SHOWING UNDERCOMPENSATION? WHAT IS THIS SHOWING?

7 MR. GLACKIN: YES. AND I JUST HAVE TO CONFESS,
8 I'M -- I CAN'T POINT TO -- THE RESULT OF THESE --

9 THE COURT: IS THIS ALL HYPOTHETICAL? OR THIS IS
10 THE SAME THING WHERE YOU TOOK AGGREGATED DATA OF ALL EMPLOYEES
11 OF ALL DEFENDANTS?

12 MR. GLACKIN: WELL, WE DIDN'T TAKE -- SO WE DID NOT
13 TAKE -- I JUST WANT TO BE CAREFUL ABOUT TERMS.

14 WE DIDN'T START WITH AGGREGATE DATA. WE STARTED WITH THE
15 WHOLE TRANSACTIONAL DATABASE -- EXCUSE ME -- THE WHOLE
16 COMPENSATION DATABASE. SO ALL 500,000 OBSERVATIONS, 100,000
17 OBSERVATIONS A YEAR FOR HOWEVER MANY YEARS.

18 AND --

19 THE COURT: AND "OBSERVATION" BEING THE TOTAL
20 COMPENSATION FOR A SINGLE EMPLOYEE AT A DEFENDANT?

21 MR. GLACKIN: CORRECT, WHAT SOMEBODY WAS PAID IN A
22 YEAR, IN A PARTICULAR YEAR IS AN OBSERVATION.

23 AND WE ASKED -- YES, THAT WAS THE DATA SET THAT WAS USED
24 TO ESTIMATE THIS.

25 AND THEN DR. LEAMER HAS PROGRAMMED A STATISTICAL

1 REGRESSION ANALYSIS THAT ATTEMPTS TO ANSWER THE QUESTION OF
2 WHAT COMPENSATION -- WHAT THEIR COMPENSATION SHOULD HAVE BEEN
3 IF THE AGREEMENTS HAD NOT BEEN IN PLACE.

4 THE COURT: SO THIS DEPENDENT VARIABLE THAT'S AT THE
5 TOP OF FIGURE 20, THAT'S THE HYPOTHETICAL INDIVIDUAL'S
6 COMPENSATION? OR THAT'S AN AVERAGE OF ALL OF THE OBSERVATIONS
7 THAT YOU ANALYZED? WHAT IS THAT NUMBER?

8 MR. GLACKIN: RIGHT. SO WHAT -- I'M -- AND THE ONLY
9 REASON I'M GETTING TRIPPED UP A LITTLE BIT IS BECAUSE THE
10 EXACT -- WHAT EXACTLY EACH OF THESE REPRESENTS I'M -- I WANT TO
11 BE VERY CAREFUL ABOUT WHAT I SAY.

12 THE EASIEST WAY FOR ME TO EXPLAIN IT IS WHAT THE
13 REGRESSION DOES IS IT ESTIMATES, USING ALL THIS DATA, A SINGLE
14 VARIABLE FOR IMPACT OF THE AGREEMENTS, AND I THINK THAT MIGHT
15 BE THE QUESTION YOU'RE TRYING -- YOU'RE GETTING TO, AND I WILL
16 ADMIT THAT THAT IS WHAT IT DOES. IT IS ESTIMATING A SINGLE
17 VARIABLE REPRESENTING THE ESTIMATED EFFECT OF THE AGREEMENTS.

18 AND I CAN TELL YOU THAT IN BROAD TERMS WHAT IT'S DOING IS
19 IT'S LOOKING AT THE RELATIONSHIP OF COMPENSATION OF EMPLOYEES
20 IN YEARS PRIOR TO AND AFTER THE CONSPIRACY. IT'S LOOKING AT
21 THE RELATIONSHIP BETWEEN COMPENSATION AND CERTAIN KNOWN
22 VARIABLES, LIKE AGE COMPOSITION -- EXCUSE ME -- LIKE
23 UNEMPLOYMENT IN SANTA CLARA, OR THE EMPLOYMENT RATE IN
24 SANTA CLARA COUNTY WAS USED TO -- EXCUSE ME -- REPRESENT THE
25 ROBUSTNESS OR THE HEALTH OF THE TECHNOLOGY SECTOR IN WHICH

1 THESE COMPANIES OPERATE.

2 IT ESTIMATES THE RELATIONSHIP BETWEEN COMPENSATION AND
3 THAT -- AND A SET OF VARIABLES LIKE THAT, AND THEN IT ASKS,
4 ASSUMING THAT THAT RELATIONSHIP IS MEANINGFUL, WHAT WAS THE
5 EFFECT OF -- WHAT SHOULD HAVE BEEN THE COMPENSATION THAT WAS
6 PAID DURING THE PERIOD UNDER STUDY?

7 AND THEN THAT IS EXPRESSED AS A VARIABLE. AND THEN IT IS
8 POSSIBLE, USING THAT VARIABLE, TO DERIVE THE -- WELL, AND THEN
9 THE NEXT STEP ACTUALLY IS IN ORDER TO ACCOUNT FOR THE
10 HETEROGENEITY AT THESE FIRMS, IN ORDER TO ACCOUNT FOR THE FACT
11 THAT THEY'RE NOT ALL THE SAME, DR. LEAMER HAS THEN, FOR EVERY
12 FIRM, TAKEN THE CONDUCT VARIABLE AND ALLOWED IT TO BE CHANGED
13 DEPENDING ON FIRM-SPECIFIC FACTORS, SUCH AS A COMPANY'S
14 REVENUES, SUCH AS THE AGE COMPOSITION OF THE WORK FORCE.

15 THE COURT: IS THAT THE MINUS 1 AND MINUS 2? IS
16 THAT 5 THROUGH 18?

17 MR. GLACKIN: YES. I THINK THAT'S PROBABLY -- YOU
18 KNOW, THAT IS PROBABLY REPRESENTING EXACTLY THE INTERACTIVE
19 RESULT.

20 AND THEN USING THAT DIFFERENT VARIABLE, THE NEW VARIABLE
21 FOR EVERY COMPANY FOR EACH YEAR, DR. LEAMER THEN IS ABLE TO
22 GENERATE AN ESTIMATE OF THE PERCENTAGE BY WHICH TOTAL
23 COMPENSATION WAS REDUCED AT THE COMPANY.

24 THE COURT: SO SOMEHOW HE'S ABLE TO CALCULATE HOW
25 MUCH EACH EMPLOYEE SHOULD HAVE BEEN PAID AND WHAT PERCENTAGE OF

1 WHAT THEY WERE PAID THAT DELTA IS? IS THAT WHAT THIS IS
2 SHOWING?

3 MR. GLACKIN: CORRECT. WELL, WHAT HE'S --

4 THE COURT: WHAT IS THIS IN THIS ESTIMATE COLUMN?
5 WHAT IS THAT? THAT'S SAYING HOW MUCH OF THE TOTAL
6 COMPENSATION --

7 MR. GLACKIN: I'M ONLY -- SORRY.

8 THE COURT: GO AHEAD.

9 MR. GLACKIN: I'M ONLY HESITATING BECAUSE I DON'T
10 THINK THAT -- I DON'T KNOW THAT YOU CAN LOOK AT, FOR EXAMPLE,
11 THE LINE CONDUCT AND SAY THAT THAT MEANS MINUS 16 PERCENT. I
12 DON'T THINK THAT THAT'S EXACTLY HOW YOU INTERPRET THAT.

13 BUT WHAT THAT IS IS -- IT REPRESENTS THE DELTA, IF YOU
14 WILL, BETWEEN WHAT THE REGRESSION PREDICTS PEOPLE SHOULD HAVE
15 BEEN PAID AND WHAT THEY WERE ACTUALLY PAID.

16 AND IT'S -- STRICTLY SPEAKING, IT'S THE DELTA BETWEEN THE
17 TOTAL COMPENSATION, THE PREDICTED TOTAL COMPENSATION AT THE
18 FIRM AND THE ACTUAL COMPENSATION.

19 THE COURT: AND HOW DID HE COME UP WITH THE
20 PREDICTED COMPENSATION?

21 MR. GLACKIN: SO IN -- BY -- THE WAY REGRESSION
22 ANALYSIS WORKS IS YOU PICK A SET OF VARIABLES THAT ARE CALLED
23 THE EXPLANATORY VARIABLES, AND THESE ARE THE VARIABLES THAT YOU
24 THINK SHOULD EXPLAIN COMPENSATION, AND YOU EXAMINE THE
25 RELATIONSHIP BETWEEN THE EXPLANATORY VARIABLES AND COMPENSATION

1 DURING A TIME PERIOD NOT AFFECTED BY THE AGREEMENTS AND YOU
2 EXPRESS THAT RELATIONSHIP IN NUMBERS.

3 AND I BELIEVE THAT THAT IS THE -- SOME OF THAT IS WHAT'S
4 HERE IN THE REGRESSION OUTPUT.

5 THEN YOU ASK YOURSELF, IF THOSE RELATIONSHIPS ARE STEADY,
6 AND THERE'S NO REASON TO BELIEVE THEY'RE NOT -- AND THAT'S ONE
7 THING WE TEST FOR, I THINK, AS YOU'RE DOING THE REGRESSION,
8 WHAT SHOULD HAVE BEEN COMPENSATION DURING THE PERIOD THAT THE
9 AGREEMENTS WERE IN EFFECT?

10 I MEAN, LIKE A -- THIS IS A TOTALLY SIMPLISTIC WAY TO LOOK
11 AT IT, BUT SUPPOSE YOU SHOW THAT, OR YOU -- YOUR REGRESSION
12 SHOWS THAT WHEN A COMPANY'S REVENUES GO UP, WORKER COMPENSATION
13 TENDS TO GO UP BY A CERTAIN AMOUNT. THERE'S A RELATIONSHIP
14 BETWEEN INCREASED REVENUES AT A COMPANY AND WORKER
15 COMPENSATION.

16 THEN YOU LOOK AT THE PERIOD UNDER STUDY AND YOU ASK
17 YOURSELF, WELL, IN THIS AREA WHERE -- YOU KNOW, DURING THIS
18 PERIOD OF TIME WHEN COMPETITION WAS RESTRAINED, DOES THE --
19 DOES THAT RELATIONSHIP APPEAR TO BE RESPECTED? IS AN INCREASE
20 IN REVENUES OR A DIMINISHMENT IN REVENUES HAVING THE EXPECTED
21 EFFECT ON COMPENSATION? THAT'S THE QUESTION YOU'RE ASKING.

22 YOU PREDICT THAT, SEEING A COMPANY'S REVENUES GO UP, THE
23 COMPENSATION SHOULD GO UP BY A CERTAIN AMOUNT.

24 AND IF YOU SEE THAT NOT HAPPENING, THE REGRESSION IS
25 TELLING YOU THAT THAT'S THE EFFECT OF THE THING THAT YOU'RE

1 STUDYING.

2 AND THAT'S -- THIS IS A VERY UNEDUCATED WAY FOR ME OF --
3 BECAUSE I'VE REACHED THE LIMITS, I THINK, OF WHAT I CAN
4 EXPLAIN.

5 THE COURT: WHAT ABOUT FIGURE 22? WHAT IS THIS?

6 MR. GLACKIN: SO FIGURE 22 IS TAKING THIS VALUE --
7 SO WHAT THE -- WHAT THE REGRESSION TELLS YOU IS THE VALUE OF
8 THE CONDUCT VARIABLE, AND IF YOU APPLY THE CONDUCT VARIABLE TO
9 TOTAL COMPENSATION, OR -- IT TELLS YOU THE -- THE REGRESSION
10 TELLS YOU THE COMPENSATION THAT SHOULD HAVE BEEN. THIS FIGURE
11 HERE ON 22 IS THE AMOUNT BY WHICH ACTUAL COMPENSATION WAS LOWER
12 THAN THE COMPENSATION THAT SHOULD HAVE BEEN.

13 THE COURT: SO EVERY INDIVIDUAL EMPLOYEE OF THESE
14 COMPANIES RECEIVED THIS LEVEL, THIS PERCENTAGE REDUCTION IN
15 THEIR TOTAL COMPENSATION BECAUSE OF THE AGREEMENTS?

16 MR. GLACKIN: NO, NO. THAT'S NOT WHAT WE'RE SAYING.

17 THE COURT: OKAY.

18 MR. GLACKIN: WHAT WE'RE SAYING IS THAT, FOR
19 EXAMPLE, IN 2005 AT ADOBE, THE TOTAL COMPENSATION PAID TO
20 EMPLOYEES WAS 1.6 PERCENT LOWER THAN THE REGRESSION PREDICTS IT
21 SHOULD HAVE BEEN.

22 THE COURT: BECAUSE OF THE AGREEMENTS?

23 MR. GLACKIN: BECAUSE OF THE AGREEMENTS, EXACTLY.
24 BECAUSE THE ONLY THING THAT'S DIFFERENT ABOUT THE TWO PERIODS
25 OF TIME YOU'RE STUDYING IS THE AGREEMENTS.

1 THE COURT: BUT THAT APPLIES TO EVERY EMPLOYEE'S
2 COMPENSATION AT ADOBE IN THAT YEAR. RIGHT?

3 MR. GLACKIN: WELL, IT APPLIES IN THE SENSE THAT
4 EVERY, EVERY MEMBER OF THE CLASS WAS PAID OUT OF THAT PILE OF
5 MONEY, OUT OF THAT TOTAL COMPENSATION.

6 IT DOESN'T APPLY -- WE ARE NOT SAYING THAT THERE WAS A 1.6
7 PERCENT -- THAT IT WAS 1.6 PERCENT FOR EVERY EMPLOYEE. WE
8 CAN'T -- WE CANNOT ESTIMATE --

9 THE COURT: OH, YOU'RE SAYING IN TOTAL, THE TOTAL
10 COMPENSATION WAS THAT MUCH LESS?

11 MR. GLACKIN: EXACTLY.

12 THE COURT: I SEE.

13 MR. GLACKIN: TOTAL -- SO IN 2005, ADOBE PAID ITS
14 EMPLOYEES A MILLION DOLLARS -- A BILLION DOLLARS AND, IN
15 REALITY, ADOBE SHOULD HAVE PAID ITS EMPLOYEES 1.6 PERCENT MORE
16 THAN THAT.

17 THE COURT: I SEE. OKAY. ALL RIGHT. I HAVE SOME
18 MORE QUESTIONS, BUT I'D LIKE TO --

19 LET ME ASK MS. SHORTRIDGE --

20 (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE COURT
21 REPORTER.)

22 THE COURT: AND I DO WANT TO HANDLE THE CMC AND TALK
23 ABOUT DISCOVERY.

24 LET ME ASK, SINCE WE DON'T HAVE THE DATA ON WHO WOULD HAVE
25 BEEN COLD CALLED AND HOW MANY COLD CALLS WOULD HAVE ACTUALLY

1 BEEN CONDUCTED AND A LOT OF THE DATA IS NOT TRANSPARENT FROM
2 THE PAYROLL RECORDS, WHICH ARE SORT OF THE LIMITED UNIVERSE OF
3 WHAT DOES EXIST IN TERMS OF DOCUMENTATION, WHAT IS THERE TO
4 LINK THE DO NOT COLD CALL AGREEMENTS WITH DECREASED MOBILITY?

5 MR. GLACKIN: SO YOU'RE ASKING -- I GUESS, WHEN YOU
6 SAY WHAT IS IT, ARE YOU ASKING ME FROM A DATA PERSPECTIVE OR A
7 THEORY PERSPECTIVE OR FROM A DOCUMENTARY EVIDENCE PERSPECTIVE?

8 THE COURT: WELL, I GUESS I'M ASKING YOU FROM A
9 HOW DO WE FIND DR. LEAMER AS NOT OVERLY SPECULATIVE
10 PERSPECTIVE?

11 MR. GLACKIN: OKAY.

12 THE COURT: YEAH.

13 MR. GLACKIN: SO FIRST OF ALL, THE ECONOMIC THEORY
14 PREDICTS THAT REDUCED COLD CALLING WOULD HAVE THIS KIND OF
15 EFFECT.

16 THE COURT: UM-HUM.

17 MR. GLACKIN: AND IT'S NOT FRINGE ECONOMIC THEORY.
18 THIS IS MAIN STREAM, NOBEL PRIZE WINNING ECONOMIC THEORY.

19 SO THE THING THAT DR. LEAMER DID FROM A QUANTITATIVE
20 STANDPOINT TO TEST FOR WHAT HE CALLS THE PRICE DISCOVERY
21 PROCESS WAS THAT WAS THE MOVERS AND STAYERS ANALYSIS, AND WHAT
22 DR. LEAMER IS DOING THERE -- AND I CAN POINT YOU TO THE CHART
23 IF YOU WANT TO SEE IT. I THINK IT'S PAGE 37 AND PAGE 38.
24 RIGHT, PAGE 37 AND PAGE 38.

25 SO THE PREMISE OF THE PRICE DISCOVERY THEORY IS THAT LABOR

1 IS NOT A COMMODITY, AND THAT PEOPLE AREN'T PAID LIKE YOU SELL
2 PORK BELLIES ON THE CBOT, AND THAT WAGES ARE -- THAT PEOPLE --
3 THAT WORKERS AND EMPLOYERS IN THE MARKET ARE CONSTANTLY LOOKING
4 FOR BETTER PRICE OR THE RIGHT PRICE FOR THEIR -- FOR THE SKILLS
5 THAT THEY ARE SEEKING TO BUY OR SELL.

6 NOW, IF YOU -- ONE SYMPTOM OF THAT, IF THAT'S TRUE, ONE
7 SYMPTOM OF THAT WOULD BE THAT WHEN PEOPLE LEAVE A COMPANY, THEY
8 SEE INCREASES IN THEIR PAY, AND IF YOU ASKED YOURSELF WHAT
9 HAPPENS TO PEOPLE WHEN THEY LEAVE THEIR COMPANY AND THE ANSWER
10 WAS THEY DIDN'T GET A BIG BUMP IN PAY, RIGHT, THAT WOULD
11 SUGGEST THAT THERE IS NOT -- YOU'RE WORKING WITH A MARKET WHERE
12 THERE ISN'T AN INFORMATION IMPERFECTION AND THAT EVERYBODY DOES
13 KNOW, SORT OF A PRIORI, WHAT THEY'RE WORTH.

14 SO DR. LEAMER -- WE WERE ABLE -- AGAIN, WE WERE WORKING
15 WITH THE DATA WE HAVE. WE WERE ABLE TO LOOK AT THE CHANGE IN
16 COMPENSATION THAT PEOPLE EXPERIENCE WHEN THEY MOVE BETWEEN
17 THESE FIRMS BECAUSE WE COULD TRACK THEM USING UNIQUE
18 IDENTIFICATION.

19 AND WHAT WE -- WHAT DR. LEAMER SAW IS THAT WHEN PEOPLE
20 MOVE FIRMS, THEY GOT A BIG PAY RAISE. AND THAT'S NOT
21 SURPRISING, ESPECIALLY IN THIS CONTEXT BECAUSE, AGAIN, WE'RE
22 NOT TALKING ABOUT COMMODITIES AND WE'RE NOT -- WE'RE ALSO NOT
23 TALKING ABOUT PEOPLE WHO ARE WORKING FOR MINIMUM WAGE AT A FAST
24 FOOD RESTAURANT. THESE ARE SKILLED WORK FORCES.

25 SO THAT CONFIRMS THAT THERE -- THAT THERE IS AN

1 INFORMATION PROBLEM IN THIS MARKET, THAT THE PEOPLE IN THE
2 MARKET DON'T HAVE PERFECT INFORMATION, THAT THEY ARE LOOKING TO
3 GET A BETTER PRICE FOR THEIR SKILLS, AND THAT WHEN THEY MOVE
4 FROM ONE DEFENDANT TO ANOTHER, THEY DO, ON AVERAGE, GET A MUCH
5 BETTER PRICE FOR THEIR SKILLS. THAT'S WHAT THIS SHOWS.

6 SO, AGAIN, IT'S AN ATTEMPT TO SAY -- IT'S AN ATTEMPT TO
7 QUESTION, IS THIS THING THAT STANDARD ECONOMIC THEORY PREDICTS,
8 IS IT TRUE OF THIS MARKET WHERE I BELIEVE IT IS TRUE? I'LL RUN
9 THIS TEST. I -- THE TEST IS CONSISTENT WITH WHAT I WOULD
10 PREDICT, SO THAT IS A REASON FOR ME TO BELIEVE I AM CORRECT.

11 THE COURT: HOW DO YOU EXPLAIN THAT THERE HAVEN'T
12 BEEN MANY HIRES AMONGST THE DEFENDANTS AFTER THE INJUNCTION WAS
13 ENTERED IN THE D.O.J. CASE IN D.C.?

14 MR. GLACKIN: SO THAT'S AN EXCELLENT QUESTION.
15 THAT'S A VERY INTERESTING QUESTION ACTUALLY.

16 I DON'T -- I CAN'T -- I DON'T HAVE THE EXPLANATION FOR WHY
17 THAT IS.

18 I DO KNOW THAT IN SOME OF THE DEPOSITIONS THAT HAVE
19 OCCURRED -- AT LEAST, I KNOW OF ONE WHERE THE WITNESS TESTIFIED
20 THAT THE COMPANY, NOTWITHSTANDING THE INJUNCTION, CONTINUES TO
21 UNILATERALLY, SUPPOSEDLY UNILATERALLY SIMPLY NOT HIRE FROM THE
22 COMPANY WITH WHICH IT PREVIOUSLY HAD AN AGREEMENT.

23 SO IT MIGHT BE THAT THEY ARE CONTINUING TO VIOLATE THE
24 LAW, OR IT MIGHT BE THAT THEY HAVE ALL -- THEY'RE NOT TALKING
25 TO EACH OTHER, BUT THEY ARE ALL UNILATERALLY DECIDING TO

1 CONTINUE TO NOT POACH EACH OTHER'S EMPLOYEES, OR IT MIGHT BE
2 SOME OTHER REASON. I DON'T HAVE THE -- WE HAVEN'T TRIED TO
3 EXPLAIN THAT.

4 THE COURT: UM-HUM.

5 OKAY. LET ME ASK THE DEFENDANTS A FEW QUESTIONS.

6 YOUR EXPERT, DR. MURPHY, FOCUSES ONLY ON PEOPLE WHO
7 ACTUALLY LEFT ONE OF THE DEFENDANT COMPANIES FOR ONE OF THE
8 CO-DEFENDANTS, AND I FIND DR. LEAMER'S THEORY THAT THAT'S TOO
9 LIMITED IN HOW YOU LOOK AT ANY POTENTIAL DAMAGE PERSUASIVE
10 BECAUSE, AS YOU SAID, IF AN EMPLOYEE GETS A BETTER OFFER FROM
11 ANOTHER COMPANY, THEY CAN VERY MUCH GO AND TRY TO NEGOTIATE AN
12 INCREASE IN THEIR OWN SALARY FROM THEIR CURRENT EMPLOYER.

13 AND SO WHY SHOULDN'T THAT BE TAKEN INTO ACCOUNT IN
14 DETERMINING WHETHER THERE'S DAMAGE VERSUS JUST LOOKING AT WHO'S
15 ACTUALLY MOVED, THE MOBILITY VERSUS ACTUAL MOVEMENT SORT OF
16 DISTINCTION THAT DR. LEAMER MAKES?

17 MR. MITTELSTAEDT: WELL, DR. MURPHY LOOKED AT
18 MOVEMENT FOR A DIFFERENT REASON. HIS POINT ON MOVEMENT WAS 99
19 PERCENT OF THE EMPLOYEES WHO LEFT THESE DEFENDANTS OR CAME TO
20 THESE DEFENDANTS CAME FROM NON-DEFENDANTS.

21 THE COURT: BECAUSE THERE WERE THESE COLLUSIVE
22 AGREEMENTS IN EFFECT.

23 MR. MITTELSTAEDT: NO, BEFORE. BEFORE, YOUR HONOR.
24 BEFORE THE AGREEMENT. IT DIDN'T CHANGE DURING THE AGREEMENT.

25 AND THE POINT THAT MAKES IS THESE AGREEMENTS AFFECTED SUCH

1 A SMALL PERCENT OF THE MARKET THAT THERE WOULD BE NO REASON TO
2 THINK THERE WOULD BE ANY MEASURABLE OR BROAD IMPACT AT ALL, AND
3 EVEN FOR THE COMPANIES THAT HAD NO COLD CALL AGREEMENTS.

4 THE INFORMATION THAT AN EMPLOYEE WOULD HAVE RECEIVED WOULD
5 HAVE BEEN REPLACED -- OR WOULD HAVE COME FROM SOMEPLACE ELSE
6 BECAUSE THAT PERSON CONTINUED TO GET COLD CALLS IF THEY WERE
7 GETTING COLD CALLS FROM ALL THE --

8 THE COURT: I THOUGHT THAT HE LIMITED HIS DATA TO
9 JUST DURING THE CLASS PERIOD AND AFTER, WHEREAS DR. LEAMER
10 LOOKED AT BEFORE THE CLASS PERIOD, DURING THE CLASS PERIOD, AND
11 THEN AFTER.

12 MR. MITTELSTAEDT: NO. I THINK -- I THINK THIS --
13 DR. MURPHY LOOKED --

14 THE COURT: ISN'T THAT IN ONE INSTANCE WHERE
15 DR. MURPHY ONLY LOOKED AT THE CLASS PERIOD AND THEN TWO
16 YEARS -- HE LOOKED AT 2010/2011, BUT DID NOT ANALYZE THE PRE --

17 MR. MITTELSTAEDT: I THINK --

18 THE COURT: -- PERIOD. I KNOW THAT OCCURRED IN ONE
19 INSTANCE. I CAN'T REMEMBER EXACTLY THE CONTEXT.

20 MR. GLACKIN: EXCUSE ME. I DIDN'T MEAN TO TALK OVER
21 YOU.

22 YOU MIGHT BE THINKING OF THE REGRESSION ANALYSIS WHERE
23 DR. MURPHY -- BASICALLY ONE OF HIS SENSITIVITY ANALYSES IS TO
24 ONLY USE HALF THE DATA AND RUN THE REGRESSION USING ONLY THE
25 AFTER PERIOD OR ONLY THE BEFORE PERIOD AND HE CLAIMS THAT

1 THAT'S PROBLEMATIC. THAT MIGHT BE WHAT YOU'RE THINKING OF.

2 MR. MITTELSTAEDT: YOUR HONOR, I'M REFERRING TO
3 MURPHY TABLE NUMBER 1 AT PAGE 8 AND APPENDIX 1A, WHICH SHOWS
4 BEFORE AS WELL.

5 BUT, YOUR HONOR, THERE IS A MUCH MORE FUNDAMENTAL PROBLEM
6 HERE, AND WHEN YOU WALK THROUGH WHAT LEAMER SUPPOSEDLY DID,
7 THAT WAS JUST NOT RIGHT. IT WAS JUST NOT RIGHT, AND I WOULD
8 LIKE TO, TO MAKE TWO POINTS.

9 THE COURT: CAN I ASK YOU, ALL OF THE DEFENDANTS'
10 POSITIONS SORT OF FLY IN THE FACE OF YOUR DOCUMENTS THAT WERE
11 CREATED CONTEMPORANEOUSLY. I MEAN, THE DOCUMENTS SAY COLD
12 CALLING CANDIDATES IS ONE OF THE MOST EFFICIENT AND EFFECTIVE
13 WAYS TO RECRUIT. IT TALKS ALL ABOUT WHEN PEOPLE GET A COUNTER
14 OFFER, THAT IT CAUSES UNHAPPINESS AND YOU HAVE TO HAVE A
15 SYSTEMATIC APPROACH TO COMPENSATION TO AVOID THESE BIDDING
16 WARS.

17 THAT I THINK IS THE BIGGEST PROBLEM FOR THE DEFENDANTS IS
18 THAT THE CONTEMPORANEOUS DOCUMENTS THAT WERE CREATED AT THE
19 TIME SORT OF ACKNOWLEDGE ALL OF THE EFFECTS THAT DR. LEAMER IS
20 TRYING TO PROVE.

21 I WILL AGREE THAT THERE ARE A LOT OF HOLES IN DR. LEAMER'S
22 ANALYSIS.

23 BUT ONE OF THE STRONGEST PIECES OF EVIDENCE THE PLAINTIFFS
24 HAVE IS YOUR OWN DOCUMENTS.

25 MR. MITTELSTAEDT: I DON'T THINK THAT'S RIGHT, YOUR

1 HONOR.

2 THE COURT: UM-HUM.

3 MR. MITTELSTAEDT: THERE IS NOT A SINGLE DOCUMENT
4 THAT SAYS WE'VE GIVEN A RAISE TO SOMEBODY AND SO NOW WE'RE
5 GOING TO RAISE EVERYBODY ELSE IN THAT PERSON'S WORK GROUP, LET
6 ALONE THAT WE'RE GOING TO RAISE EVERYBODY IN THE REST OF THE
7 COMPANY, LET ALONE THAT ALL THE OTHER COMPANIES ARE GOING TO
8 FOLLOW.

9 THEY DO NOT SAY THAT.

10 THEY EXPRESS CONCERN ABOUT INTERNAL EQUITY. THEY TAKE A
11 LOOK AT IT.

12 BUT, YOUR HONOR, IN THE BEFORE PERIOD, AS I SAID BEFORE,
13 IF THE PLAINTIFFS' RIPPLE THEORY WORKED, THERE WOULD BE A LOT
14 OF EVIDENCE IN IT, OF IT, AND IT WOULD BE IN THE DATA AND IT'S
15 NOT IN THE DATA.

16 THE COURT: I MEAN, DO YOU WANT ME TO GET INTO THESE
17 E-MAILS? I'M HAPPY TO DO IT. I DISAGREE WITH YOU THAT THEY
18 DON'T TALK ABOUT IF SOMEONE GETS A BETTER OFFER FROM A
19 COMPETITOR, YOU HAVE TO MAKE THE DECISION OF WHETHER YOU WANT
20 TO KEEP THIS PERSON BY RAISING THEIR COMPENSATION OR LETTING
21 THEM GO AND HOW WE SHOULDN'T DEAL WITH THIS IN THIS WAY, THAT
22 WE SHOULD HAVE A SYSTEMATIC APPROACH SO WE'RE NOT HAVING TO BUY
23 PEOPLE OFF INDIVIDUALLY.

24 I MEAN, IF YOU WANT TO GET INTO THESE DOCUMENTS, I'M HAPPY
25 TO DO THAT. BUT TO SAY THEY DON'T EXIST --

1 MR. MITTELSTAEDT: NO.

2 THE COURT: -- I FIND IS REALLY PROBLEMATIC.

3 MR. MITTELSTAEDT: YOUR HONOR --

4 THE COURT: YEAH.

5 MR. MITTELSTAEDT: -- THE DOCUMENT I THINK YOU'RE
6 REFERRING TO, OR THE DOCUMENTS, TALK ABOUT INDIVIDUALS.

7 IF WE --

8 THE COURT: AND THEY TALK ABOUT WHY THE INDIVIDUAL
9 METHOD OF DEALING WITH THIS IS INFERIOR TO HAVING A SYSTEMATIC
10 APPROACH TO AVOIDING THESE BIDDING WARS BY HAVING THESE
11 COLLUSIVE AGREEMENTS WITH THE OTHER CO-DEFENDANTS.

12 MR. MITTELSTAEDT: BUT, YOUR HONOR --

13 THE COURT: YEAH.

14 MR. MITTELSTAEDT: -- THAT DOES NOT HELP DETERMINE
15 WHICH OF THE EMPLOYEES WERE IMPACTED AND WHICH ONES WERE NOT
16 AND WHICH ONES BENEFITED.

17 AND WHEN I SAY THAT, WHAT I MEAN IS FOR ANY EMPLOYEE WHO
18 MISSED OUT ON A COLD CALL AND, THEREFORE, DIDN'T GET THE CHANCE
19 TO NEGOTIATE A JOB RAISE OR GET A NEW JOB, SOMEBODY GOT THAT
20 JOB. SOMEBODY GOT THAT JOB.

21 AND BECAUSE -- AND THEY'RE A CLASS MEMBER. AND SO WHAT WE
22 HAVE HERE IN THIS GROUP --

23 THE COURT: SO HOW DO WE KNOW THAT THAT PERSON WHO
24 CAME FROM A NON-DEFENDANT WHO GOT THE JOB WOULDN'T HAVE BEEN
25 PAID MORE BUT FOR THESE COLLUSIVE AGREEMENTS? HOW DO YOU KNOW

1 THAT?

2 MR. MITTELSTAEDT: WELL, THAT PERSON IS BETTER OFF
3 BECAUSE THAT PERSON TOOK THE JOB. I MEAN, WHY WOULD THEY HAVE
4 TAKEN THE JOB OTHERWISE?

5 THEY GOT THE JOB THAT --

6 THE COURT: BUT WOULD YOU AGREE THAT THEY COULD HAVE
7 POTENTIALLY BEEN PAID MORE, THAT THAT JOB COULD HAVE BEEN WORTH
8 MORE IF THESE AGREEMENTS DIDN'T EXIST?

9 MR. MITTELSTAEDT: NO, I DON'T THINK THERE'S ANY
10 REASON TO THINK THAT BECAUSE OF THE 99 PERCENT POINT. 99
11 PERCENT OF THE MOVEMENT, MOBILITY, WHATEVER ANYONE WANTS TO
12 CALL IT, WAS UNAFFECTED BY ANY OF THIS.

13 BUT, YOUR HONOR, I REALLY WANT TO EXPLAIN, IF I CAN, WHAT
14 LEAMER IS DOING, BECAUSE THE ANSWERS YOU RECEIVED ARE JUST NOT
15 RIGHT, AND I'VE GOT -- AND I KNOW THAT, YOU KNOW, WE'RE SHORT
16 OF TIME, BUT I'VE HARDLY SAID ANYTHING AND I'VE GOT A BINDER
17 THAT WILL ALLOW ME TO WALK YOUR HONOR THROUGH WHAT'S REALLY
18 GOING ON HERE AS EXPEDITIOUSLY AS POSSIBLE, IF I CAN JUST DO
19 THIS.

20 THE COURT: HOW MANY PAGES IS THAT BINDER? IT'S
21 LOOKING QUITE THICK.

22 MR. MITTELSTAEDT: WELL, I'LL SKIP -- I'LL JUST GO
23 TO THE LEAMER PART, WHICH IS 37 PAGES, AND I CAN WALK YOUR
24 HONOR THROUGH IT QUICK AND I WON'T GO THROUGH ALL OF THEM. I
25 JUST WANT TO GIVE YOU A FLAVOR --

1 THE COURT: HAVE YOU SHOWN THAT TO THE PLAINTIFFS?

2 MR. MITTELSTAEDT: YES. WE GAVE IT TO THEM.

3 THE COURT: WHY DON'T I TAKE A COPY OF IT, I'LL
4 REVIEW IT DURING THE BREAK, AND IF I HAVE QUESTIONS, I CAN ASK
5 YOU SPECIFICALLY.

6 I MEAN, I AGREE WITH YOU, FRANKLY, BOTH EXPERTS -- BOTH
7 EXPERTS' REPORTS HAVE A LOT OF ISSUES. I'LL PUT IT THAT WAY.
8 I THINK BOTH HAVE --

9 MR. MITTELSTAEDT: YOUR HONOR --

10 THE COURT: -- A CONSIDERABLE AMOUNT OF CREATIVE
11 ECONOMICS. I'LL PUT IT THAT WAY.

12 MR. MITTELSTAEDT: YOUR HONOR, THEY HAVE THE BURDEN
13 HERE, AND THEIR BURDEN, UNDER THEIR OWN METHOD, IS TO SHOW THAT
14 THERE'S THIS RIGID PAY STRUCTURE. IT'S SO RIGID IF ONE PERSON
15 GETS A RAISE OR PROMOTION, EVERYBODY ELSE GETS A RAISE OR
16 PROMOTION.

17 THE DATA, WHICH IS IN THIS BINDER AT TABS 4 AND 6, SHOW
18 THAT THAT'S JUST NOT RIGHT. THERE IS, AT TAB 4 --

19 THE COURT: TAB 4, OKAY.

20 MR. MITTELSTAEDT: -- THIS SHOWS THE DISTRIBUTION OF
21 ANNUAL CHANGES IN TOTAL COMPENSATION FOR THE TOP TEN GOOGLE
22 JOBS THAT THEY'VE PICKED, AND IT SHOWS THAT WITHIN ONE JOB
23 TYPE -- AND EACH OF THESE ARE THE TEN JOB TYPES AT THE
24 BOTTOM -- IT SHOWS THAT ANNUAL CHANGES FOR INDIVIDUALS VARY
25 EXTREMELY WIDELY.

1 THE FIRST YEAR, FOR EXAMPLE, A QUARTER --

2 THE COURT: BUT CAN I ASK YOU, THERE ARE CERTAINLY A
3 LOT OF DOCUMENTS THAT WERE CREATED CONTEMPORANEOUSLY WHERE THE
4 DEFENDANTS SAY THAT THEY ARE CERTAINLY CONSIDERING INTERNAL
5 EQUITY.

6 MR. MITTELSTAEDT: INTERNAL EQUITY MEANING FAIRNESS,
7 AND FAIRNESS MEANING THESE COMPANIES -- AND EACH OF THEM HAD
8 DIFFERENT PAY SYSTEMS, BUT WHAT THEY HAD IN COMMON WAS THEY
9 PAID FOR PERFORMANCE.

10 AND THE PLAINTIFFS INTERPRET "INTERNAL EQUITY" TO MEAN
11 THAT IF ONE PERSON GETS A RAISE, EVERYBODY GETS A RAISE, AND
12 THAT'S JUST NOT WHAT HAPPENED, AND THESE DATA SHOW THIS. THE
13 DATA THAT WE'RE LOOKING AT HERE SHOWS THAT WITHIN ONE JOB TYPE,
14 THERE'S A WIDE DISTRIBUTION OF THE ANNUAL CHANGES IN
15 COMPENSATION.

16 SO A QUARTER -- JUST THE FIRST ONE, THE SOFTWARE ENGINEER
17 FOR GOOGLE THE FIRST YEAR, A QUARTER OF THE EMPLOYEES RECEIVED
18 A RAISE MORE THAN 80 PERCENT. THAT'S THE TOP OF THE PINK.

19 AND A QUARTER DROPPED. A QUARTER WERE BELOW THAT.

20 THE --

21 THE COURT: AND I GUESS I DON'T AGREE WITH YOU THAT
22 THEIR POSITION REQUIRES RIGID LOCKSTEP, AND THEN IT REQUIRES
23 THE ABSOLUTE SCENARIO THAT YOU JUST DESCRIBED, THAT IF ONE
24 PERSON GETS A RAISE, EVERYONE GETS ONE.

25 IF WE'RE SAYING THESE ARE GENERAL TRENDS AND GENERALLY

1 THERE COULD BE INDIVIDUAL DEVIATIONS, BUT GENERALLY THAT THERE
2 IS SOME ATTENTION PAID BY THE DEFENDANTS TO OVERALL PAY
3 STRUCTURE --

4 MR. MITTELSTAEDT: WELL --

5 THE COURT: -- THAT, YOU KNOW, OVERALL -- THERE
6 COULD BE AN INDIVIDUAL DEVIATION, BUT THAT OVERALL THESE TRENDS
7 ARE TRUE.

8 MR. MITTELSTAEDT: THE QUESTION IS, DO YOU HAVE
9 TO -- TO DETERMINE IF AN EMPLOYEE WOULD HAVE GOT A RAISE, DO
10 YOU HAVE TO GO EMPLOYEE BY EMPLOYEE? CIRCUMSTANCE BY
11 CIRCUMSTANCE? DEPARTMENT BY DEPARTMENT?

12 OR IS THERE SOME WAY TO SAY, WITH A WAVE OF A HAND,
13 EVERYBODY WOULD HAVE GOT A RAISE?

14 AND WHAT LEAMER TRIES TO DO, YOUR HONOR, IS HE DOES TWO
15 STEPS. HIS FIRST STEP IS TO ESTIMATE AN AVERAGE OVERCHARGE
16 ACROSS THE BOARD FOR ALL OF THE DEFENDANTS.

17 AND SO WHEN YOUR HONOR ASKED THE QUESTION, YOU KNOW, DO
18 FIGURES 20 AND 22 SHOW THAT EACH EMPLOYEE WAS UNDERPAID, THE
19 ANSWER WAS NO.

20 AND IT'S WORSE THAN THAT, YOUR HONOR, BECAUSE WHAT THEY'VE
21 DONE IS INSTEAD OF GOING DEFENDANT BY DEFENDANT, EVEN TO
22 ESTIMATE AN OVER -- AN AVERAGE, THEY LUMP ALL THE DEFENDANTS
23 TOGETHER, AND THE BEST WAY I CAN EXPLAIN THIS IS FIGURE 19,
24 WHICH IS -- WHICH IS ON, IN THE BINDER I'VE HANDED THE COURT,
25 PAGE 7.

1 THE COURT: UM-HUM.

2 MR. GLACKIN: TAB 7?

3 MR. MITTELSTAEDT: WELL, IT'S TAB 6, PAGE 7. I'M
4 SORRY.

5 AND WHAT HE'S DONE HERE, IT'S CALLED AVERAGE PERCENT
6 CHANGE IN TOTAL COMPENSATION, AND YOU SEE ON THE RIGHT-HAND
7 SIDE HE SAYS "ESTIMATED UNDERPAYMENT," AND THEN THIS LOOKS REAL
8 FANCY BECAUSE HE'S GOT THE NUMBER OF EMPLOYEES AND THEN THE
9 MEAN, THE MEDIAN AND SO FORTH, AND THEN HE'S GOT INITIAL AND
10 CUMULATIVE.

11 WHAT HE'S DONE HERE IS TAKE THE ANNUAL COMPENSATION FOR
12 EACH INDIVIDUAL, AND HE KNOWS WHAT COMPANY THEY'RE WITH, AND
13 INSTEAD OF ADDING IT UP EITHER BY INDIVIDUAL TO SHOW WHO WAS UP
14 OR WHO WAS DOWN DURING THE ALLEGED CONSPIRACY PERIOD, INSTEAD
15 OF DOING IT BY INDIVIDUAL, INSTEAD OF DOING IT BY COMPANY, HE
16 DID IT BY ALL THE DEFENDANTS.

17 AND SO WHEN HE HAD -- WHAT HE DID HERE WAS TAKE 2004, YOUR
18 HONOR, THE LINE, HE SHOWS, IN THE MEAN, THAT AVERAGE
19 COMPENSATION, TOTAL COMPENSATION FOR EVERYBODY WENT UP 10.3
20 PERCENT.

21 AND THEN HE TAKES 2011 AND IT GOES UP 9.7 PERCENT, YEAR TO
22 YEAR.

23 HE TAKES THE AVERAGE OF THOSE TWO TO GET A BASE LINE, SO
24 THAT'S 10.

25 AND THEN HE LOOKS AT THE NEXT YEAR, 2005, THE FIRST YEAR

1 OF THE ALLEGED VIOLATION PERIOD, AND COMPENSATION ONLY WENT UP
2 .5 PERCENT, SO HE SAYS THAT THAT MEANS THE ESTIMATED
3 UNDERPAYMENT, AS A RESULT OF THESE AGREEMENTS, WAS 9.5 -- A
4 NEGATIVE 9.5 OVER ON THE RIGHT.

5 THE COURT: UM-HUM.

6 MR. MITTELSTAEDT: AND THEN HE DOES THAT FOR THE
7 REST OF THE YEARS.

8 AND THEN ON THE NEXT PAGE OF HIS REPORT HE SAYS, "WELL,
9 THIS IS JUST SUGGESTIVE BECAUSE IT'S NOT BROKEN OUT BY
10 DEFENDANTS."

11 BUT THE QUESTION IS, WHY DIDN'T HE BREAK IT OUT BY
12 DEFENDANTS?

13 AND THE ANSWER IS ON THE NEXT TAB, PAGE 8. ON THE
14 RIGHT-HAND SIDE IS LEAMER'S NUMBERS, AND SO YOU'LL SEE FOR 2005
15 THE .5 FROM THE PREVIOUS PAGE.

16 BUT WHEN, INSTEAD OF ADDING IT UP FOR ALL DEFENDANTS
17 TOGETHER, WHEN YOU JUST ADD UP ALL THE INDIVIDUALS IN A
18 COMPANY, YOU SEE THAT ADOBE WENT UP 9.8 PERCENT IN 2008, AND
19 APPLE WENT UP 10.6. TWO COMPANIES WENT DOWN, AND THE REST WENT
20 UP.

21 AND IF YOU COMPARE THAT, AND ACTUALLY I'VE DONE THE --
22 I'VE BROKEN THIS OUT ON THE NEXT PAGE, PAGE 9. IF YOU FOLLOW
23 HIS SAME PROCEDURE AND YOU DO A BASELINE FOR ADOBE, WHAT YOU
24 GET IS YOU TAKE THE 1.5 FOR 2004 -- THIS IS AT PAGE 9 -- YOU
25 TAKE THE 1.5 YEAR TO YEAR INCREASE FOR 2004, THE 2011 YEAR TO

1 YEAR INCREASE OF 11.1, AVERAGE THOSE, AND YOU COME UP WITH A
2 6.3 PERCENT BASELINE. THIS IS THE APPROACH LEAMER TOOK TO DO
3 IT FOR ALL OF THE DEFENDANTS TOGETHER.

4 AND THEN YOU COMPARE THAT 6.3 PERCENT BASELINE WITH THE
5 ACTUAL IN 2005 OF 9.8, AND THAT GIVES YOU AN OVERPAYMENT AS A
6 RESULT OF THESE ALLEGED AGREEMENTS OF 3.4 PERCENT, WHICH IS ON
7 THE BOTTOM PART OF THE PAGE, ADOBE 2005.

8 YOU DO THE SAME THING FOR APPLE: YOU CONSTRUCT APPLE'S
9 BASELINE, COMPARE IT TO 2005, YOU GET 4.2 PERCENT.

10 YOU GET NEGATIVES FOR GOOGLE AND INTEL.

11 BUT YOU GET POSITIVES FOR INTUIT, LUCASFILM, AND PIXAR IS
12 A POSITIVE 35.6 PERCENT.

13 AND YOU KNOW WHAT LEAMER DID? HE AVERAGED ALL THOSE
14 TOGETHER IN ORDER TO SUGGEST TO THE COURT THAT THERE WAS AN
15 ESTIMATED UNDERPAYMENT AS A RESULT OF THESE AGREEMENTS, AND
16 THAT'S WHERE HE GETS HIS NEGATIVE 9.5 PERCENT.

17 WHAT DRIVES THIS CHART IS INTEL BECAUSE INTEL HAS A LITTLE
18 OVER HALF THE EMPLOYEES IN THE GROUP.

19 AND SO HE IS MISLEADING THE COURT IN SAYING THAT THIS
20 EXERCISE SHOWS AN ESTIMATED UNDERPAYMENT FOR ALL OF THE
21 DEFENDANTS OF 9.5 PERCENT, WHEREAS IF IT HAD ANY VALUE, IF YOU
22 COULD REALLY MAKE A CAUSE AND EFFECT JUMP FROM YEAR TO YEAR
23 WITHOUT ADJUSTING FOR ANYTHING, IT WOULD SHOW THAT ONE, TWO,
24 THREE, FOUR, FIVE OF THE COMPANIES, UNDER THEIR OWN THEORY,
25 OVERPAID.

1 AND SO THERE'S NO BASIS TO SAY, FOR THEM TO SAY, WELL,
2 THERE'S THIS AVERAGE, AVERAGE OVERPAYMENT.

3 AND THEN WHEN YOU GET TO HIS REGRESSION, IT'S WORSE, YOUR
4 HONOR. THIS IS FIGURE 20, AND THIS IS AT PAGE 11, PAGE 11 OF
5 THIS SAME THING.

6 THE COURT: PAGE 11 IS A DEPOSITION TRANSCRIPT.

7 MR. MITTELSTAEDT: YES, YES.

8 THE COURT: OKAY.

9 MR. MITTELSTAEDT: AND WHAT HE SAYS IN THE
10 DEPOSITION IS WHEN YOU DO A REGRESSION, YOU NEED TO DO A
11 SENSITIVITY ANALYSIS. YOU EXPLORE HOW SENSITIVE THE
12 CONCLUSIONS ARE TO A CHOICE OF VARIABLES.

13 AND THEN HE SAYS, "I'VE DONE SOME ALTERNATE EQUATIONS."

14 AND THEN ON THE NEXT PAGE, DOWN AT THE BOTTOM, "BEFORE YOU
15 RELY ON IT," A REGRESSION, "YOU NEED TO KNOW IF IT'S SENSITIVE
16 BEFORE RELYING ON IT?

17 "THAT'S CORRECT."

18 OKAY. AND THEN THE NEXT PAGE, PAGE 13, WE WERE ASKING
19 HIM, "WELL, WHAT SENSITIVITY ANALYSIS DID YOU DO?"

20 BECAUSE AS COUNSEL EXPLAINED, ON THIS REGRESSION, FIGURE
21 20, HE HAS A SINGLE CONDUCT VARIABLE FOR ALL OF THE DEFENDANTS
22 WHICH ASSUMES THAT THE EFFECT OF THE PIXAR/LUCASFILM AGREEMENT
23 WAS THE SAME ON PIXAR AS IT WAS ON ADOBE THAT DIDN'T HAVE
24 ANYTHING TO DO WITH IT, AND THEN HE ADJUSTS ONLY FOR THE AGE
25 AND THE HIRING RATE OF THE COMPANY.

1 SO THAT DOESN'T GIVE YOU ANY INDIVIDUAL COMPANY
2 INFORMATION WORTH ANYTHING.

3 BUT HERE'S WHAT HE SAYS, YOUR HONOR. "WELL, I" --

4 THE COURT: YOU SAY THESE ARE FROM THE MURPHY
5 REPORT, YOUR PAGES 9 AND 10. GIVE ME THE PAGE NUMBER OF THIS.

6 MR. MITTELSTAEDT: MURPHY REPORT, FIGURE 19.

7 THE COURT: IT'S -- IT'S DONE BY EXHIBIT.

8 MR. GLACKIN: IT'S EXHIBIT 19 -- EXCUSE ME.

9 IT'S EXHIBIT 19 TO DR. MURPHY'S REPORT.

10 THE COURT: OH.

11 MR. GLACKIN: IT'S NOT DR. LEAMER'S REPORT AT THAT
12 POINT.

13 MR. MITTELSTAEDT: YEAH, IT'S DR. MURPHY'S REPORT ON
14 THE LEFT-HAND SIDE WITH THE POOLING, THE AGGREGATE FROM MURPHY,
15 I MEAN FROM LEAMER.

16 BUT, YOUR HONOR, THIS REALLY GOES TO THE HEART OF WHAT'S
17 GOING ON HERE AND HOW MISLEADING IT IS.

18 AT PAGE 13, THIS IS LEAMER'S DEPOSITION, AND AT LINE 16
19 HE'S ASKED -- AND NOW WE'RE TALKING ABOUT WHAT SENSITIVITY
20 ANALYSES HE RAN TO SEE IF HIS, IF HIS FIGURE 20, HIS
21 REGRESSION, WAS RELIABLE.

22 AND HE SAID, "I RECALL ONE WHICH HAS TO DO WITH THE
23 DISAGGREGATION WITH DATA BY A DEFENDANT. SO I HAVE A MODEL
24 THAT HAS ALL THE DEFENDANTS.

25 "MR. GLACKIN: WAIT, WAIT, WAIT. I'M GOING TO INSTRUCT

1 YOU NOT TO ANSWER FURTHER."

2 AND THEN THE QUESTION BY MR. PICKETT: "WHAT WERE THE
3 RESULTS OF THE DISAGGREGATION?"

4 THIS IS WHEN HE RAN IT INDIVIDUALLY BY DEFENDANT, SEPARATE
5 CONDUCT VARIABLES.

6 AND MR. GLACKIN SAYS, "IF YOU ANSWER SOMETHING OTHER THAN
7 'I DON'T KNOW' OR 'I DON'T REMEMBER,' I'M GOING TO INSTRUCT YOU
8 NOT TO ANSWER."

9 AND THE WITNESS, ALMOST PREDICTABLY, SAID, "I DON'T
10 REMEMBER THE DETAILS."

11 "DID YOU RETAIN THE WORK?"

12 "WELL, IT'S PROBABLY ON MY HARD DRIVE SOMEPLACE."

13 AND THEN HE SAYS AT LINE 12, "WELL, IT'S NOT HARD TO DO.
14 YOUR EXPERTS WILL BE ABLE TO DO IT WITH THE PRESS OF A BUTTON."

15 AND SO THAT'S WHAT OUR EXPERT DID.

16 BEFORE I GO ON TO THAT, ON THE FOLLOWING EXCERPT HERE,
17 HE'S ASKED, "IF YOUR CONDUCT REGRESSIONS COME UP WITH A -- OR
18 CAME UP WITH A POSITIVE CONDUCT COEFFICIENT, MEANING THAT THE
19 ALLEGED AGREEMENT HAD A POSITIVE IMPACT ON COMPENSATION, WHAT
20 WOULD THAT TELL YOU ABOUT THE MODEL?

21 "WELL, IT WOULD RAISE CONCERNS ABOUT THE CONCEPTUAL
22 FRAMEWORK AND THE APPROPRIATENESS OF THE MODEL. THERE'S NO
23 QUESTION ABOUT THAT."

24 AND THEN --

25 THE COURT: ALL RIGHT. LET ME ASK YOU A QUESTION.

1 IF THE PLAINTIFFS WERE TO -- WHAT IS YOUR POSITION ON
2 PREDOMINANCE AS TO JUST THE TECHNICAL CLASS?

3 MR. MITTELSTAEDT: THERE IS NO BASIS TO THINK THAT
4 THERE WAS ANY JOB CATEGORY --

5 THE COURT: UM-HUM.

6 MR. MITTELSTAEDT: -- THAT -- WHERE THERE WAS ANY
7 BROAD IMPACT OF THESE AGREEMENTS.

8 WHAT WE HAVE SHOWN -- AND, YOUR HONOR, IF YOU -- I MEAN,
9 GOING BACK TO TAB 5, THIS SHOWS -- YOU TALKED WITH COUNSEL
10 ABOUT THE CONSTANT ATTRIBUTE COMPENSATION.

11 THIS TAKES THE TOP 25 JOBS BY COMPANY AND IT SHOWS THE
12 ANNUAL CHANGES, AND WHAT THIS SHOWS IS THAT SOME JOBS WENT UP
13 IN TOTAL COMP, SOME JOBS WENT DOWN TO A NEGATIVE.

14 AND SO EXHIBIT 18, WHICH IS IN TAB 5, FOR ADOBE, THAT
15 FIRST YEAR, ONE JOB -- AND THESE ARE 25 DIFFERENT JOBS -- ONE
16 JOB COMPENSATION INCREASED 11 PERCENT. ANOTHER JOB DECREASED
17 BY 14 PERCENT.

18 GOOGLE, 2006, EVEN A LARGER SWING. 53 PERCENT TO A
19 NEGATIVE 70 PERCENT.

20 THIS SHOWS THAT IF THE PLAINTIFFS WERE RIGHT, THERE WOULD
21 BE CORRELATION AMONG THESE JOB GROUPS, CORRELATION BOTH OF THE
22 EMPLOYEES WITHIN THE JOB GROUP AND THE AVERAGE.

23 THIS TAKES IT BY INDIVIDUAL WITHIN THAT -- OR NO. THIS
24 TAKES IT BY JOB TITLES AND IT SHOWS THAT THEY'RE NOT CORRELATED
25 WHEN THEY MOVE.

1 AND, YOUR HONOR, THE FIRST PART OF WHAT LEAMER DID WAS TO
2 TRY AND SHOW, IN THIS VERY MISLEADING WAY, AN AVERAGE
3 OVERCHARGE FOR EVERYBODY.

4 WE ASKED HIM, AT HIS DEPOSITION, AND HE SHOWED -- ON ONE
5 OF THESE YOU'LL SEE 20 PERCENT UNDERCHARGE FOR LUCASFILM.

6 WE ASKED HIM, "HOW DOES IT MAKE ANY SENSE THAT A COMPANY
7 COULD UNDERPAY BY 20 PERCENT AND STILL HIRE PEOPLE?"

8 AND HE PAUSED ALMOST A MINUTE AND HE SAID THAT HE WAS
9 TIRED AND IN HIS -- HE COULD NOT CONSTRUCT A STORY TO JUSTIFY
10 THAT.

11 AND WHAT THAT TELLS ME IS THAT EVEN HE KNOWS THAT THE
12 RESULTS OF HIS REGRESSION DON'T MAKE SENSE, THEY DON'T COMPORT
13 WITH THE REAL WORLD, AND, WORSE, HE DIDN'T DO IT DEFENDANT BY
14 DEFENDANT.

15 AND WHEN, WHEN --

16 THE COURT: OKAY. I'M GOING TO TAKE A BREAK NOW.
17 WE'VE BEEN GOING FOR MORE THAN TWO HOURS AND MS. SHORTRIDGE
18 NEEDS TO BREAK. OKAY?

19 THANK YOU ALL.

20 (RECESS FROM 3:36 P.M. UNTIL 3:57 P.M.)

21 THE COURT: OKAY. WELCOME BACK. PLEASE HAVE A
22 SEAT.

23 ALL RIGHT. LET'S MOVE ON TO THE CMC.

24 WHAT -- WHAT DISCOVERY DISPUTES ARE STILL OUTSTANDING? I
25 WAS GOING TO MAKE A SUGGESTION WITH THE E-MAILS BETWEEN INTUIT

1 BOARD CHAIRMAN GLENN CAMPBELL AND GOOGLE'S IN-HOUSE LAWYER, I
2 WAS GOING TO SUGGEST THAT YOU SUBMIT THEM TO ME IN CAMERA.

3 I'LL BE HAPPY TO DECIDE IT FOR YOU AND I WILL SEE IF THERE
4 REALLY IS SOME KIND OF ATTORNEY-CLIENT PRIVILEGE AGREEMENT
5 BETWEEN MR. CAMPBELL AND GOOGLE SUCH THAT IT WOULD ACTUALLY BE
6 PRIVILEGED.

7 BUT IF IT'S JUST MORE TALKING ABOUT THESE AGREEMENTS, I
8 DON'T REALLY THINK THAT'S PRIVILEGED.

9 SO WHY DON'T YOU SUBMIT THEM TO ME IN CAMERA? DO YOU WANT
10 TO DO THAT BY NEXT WEDNESDAY?

11 MR. RUBIN: SURE, YOUR HONOR. WE WOULD ALSO BE
12 SUBMITTING FACTUAL -- WITH THE COURT'S PERMISSION, WE WOULD
13 ALSO BE SUBMITTING FACTUAL DECLARATIONS ABOUT THE NATURE OF THE
14 RELATIONSHIP. I THINK ONE OF THE ISSUES THAT WAS RAISED WAS
15 THE NATURE OF THE RELATIONSHIP AND WE WOULD LIKE TO SUBMIT
16 THOSE IN CAMERA AS WELL.

17 MS. DERMODY: AND, YOUR HONOR, ON BEHALF OF
18 PLAINTIFF -- EXCUSE ME.

19 MR. RUBIN: I'M SORRY.

20 IF -- YOUR HONOR, IF YOU CAN INDULGE US, IF WE CAN SUBMIT
21 IT BY FRIDAY?

22 THE COURT: LET ME HEAR, WHAT OTHER -- NONE OF THE
23 CEO'S HAVE BEEN DEPOSED, THE SENIOR VICE-PRESIDENT OF HUMAN
24 RESOURCES AT INTEL HAS NOT BEEN DEPOSED. WHO ELSE? WHO ELSE
25 HASN'T BEEN DEPOSED?

1 MS. DERMODY: WELL, YOUR HONOR, JUST FOR THE RECORD,
2 PLAINTIFFS REQUESTED MOST OF THESE INDIVIDUALS BACK IN
3 SEPTEMBER AND IT'S BEEN QUITE A LONG PROCESS OF NEGOTIATION,
4 WITH SOME DEFENDANTS ACTUALLY ASKING THAT WE WAIT UNTIL AFTER
5 THE COURT'S ORDER ON CLASS CERTIFICATION.

6 THE COURT: NO, THAT'S NOT HAPPENING.

7 MS. DERMODY: WE HAVE NOT AGREED TO THAT AND WE HAVE
8 AGREED TO ACCOMMODATE SCHEDULES WHENEVER WE COULD, BUT WE'VE
9 INSISTED THAT DEPOSITIONS START.

10 I'LL GIVE YOU A LIST, YOUR HONOR, IF YOU'D LIKE OF WHAT'S
11 ON CALENDAR.

12 THE COURT: OKAY.

13 MS. DERMODY: FOR GOOGLE, SHONA BROWN, JANUARY 30TH.

14 THE COURT: AND SHE'S AN H.R. PERSON?

15 MS. DERMODY: YES, YOUR HONOR.

16 THE COURT: OKAY. THAT'S JANUARY 30TH?

17 MS. DERMODY: YES.

18 THE COURT: OKAY.

19 MS. DERMODY: AND ERIC SCHMIDT HAD BEEN SCHEDULED
20 FOR FEBRUARY 21ST. I UNDERSTAND WE WERE TOLD BY DEFENSE
21 COUNSEL A FEW MOMENTS AGO THAT THAT DATE MAY NOT WORK FOR
22 MR. SCHMIDT. WE WOULD LIKE TO HAVE ONE SCHEDULED AS SOON AS
23 POSSIBLE.

24 MR. RUBIN: YOUR HONOR, WE HAD PROPOSED
25 FEBRUARY 20TH, THE DAY BEFORE.

1 MS. DERMODY: AND WE HAVE TO CHECK WITH MR. HEIMANN,
2 WHO WAS SCHEDULED TO TAKE THAT DEPOSITION, IF THAT WORKS FOR
3 HIS SCHEDULE.

4 THE COURT: WELL, LET'S -- I AM REALLY DISAPPOINTED
5 THAT ALL OF THIS DISCOVERY WAS NOT DONE BEFORE THE CLASS
6 CERTIFICATION HEARING.

7 SO LET'S SUBMIT RIGHT NOW, WHAT'S THE DATE FOR
8 ERIC SCHMIDT? NO ONE IS LEAVING UNTIL WE HAVE THESE DATES SET.
9 IF WE NEED TO BE HERE UNTIL MIDNIGHT, THAT'S WHAT HAPPENS.

10 MR. RUBIN: HE'S AVAILABLE FEBRUARY 20TH.

11 THE COURT: CAN YOU TAKE IT FEBRUARY 20TH?

12 MS. DERMODY: SOMEONE WILL TAKE IT, YOUR HONOR, YES.

13 THE COURT: OKAY. YOU BETTER MAKE SOMEONE
14 AVAILABLE.

15 MS. DERMODY: YES, YOUR HONOR.

16 SO LUCASFILM RIGHT NOW, IF I HAVE THIS RIGHT,
17 MICHELINE CHAU, C-H-A-U, AND IT'S FEBRUARY 20TH.

18 THE COURT: AND WHAT IS THAT PERSON'S JOB?

19 MR. SAVERI: SHE WAS, AT VARIOUS TIMES, THE CHIEF
20 OPERATING OFFICER, OR SOMEONE AT THAT LEVEL AT LUCASFILM. HER
21 TITLE DID CHANGE THROUGHOUT THE PERIOD OF TIME AFFECTED BY THE
22 AGREEMENT, BUT SHE WAS ONE OF THE MOST SENIOR PEOPLE AT
23 LUCASFILM. IN FACT, I BELIEVE SHE REPORTED DIRECTLY TO
24 MR. LUCAS HIMSELF.

25 THE COURT: OKAY. WHO ELSE?

1 MS. DERMODY: MICHELLE MAUPIN, FEBRUARY 12TH.

2 THE COURT: OKAY.

3 MS. DERMODY: JAN VAN DER VORT, FEBRUARY 5TH.

4 AND WE HAVE REQUESTED MR. LUCAS FOR SOME TIME, BUT WE
5 HAVE -- LUCAS HAS REFUSED TO GIVE US DATES.

6 MR. PURCELL: THAT'S ACTUALLY NOT ACCURATE, YOUR
7 HONOR. WE HAVEN'T REFUSED TO GIVE THEM DATES.

8 THE COURT: OKAY. GIVE ME A DATE. WE'RE SETTING
9 THEM RIGHT NOW.

10 MR. PURCELL: I CAN'T GIVE YOU A DATE TODAY.

11 THE COURT: I'M TELLING YOU, I HAVE BEEN SO TOUGH ON
12 BOTH SIDES AT EVERY CMC ON DISCOVERY. I DON'T WANT THESE
13 GAMES, OKAY? SO THE FACT THAT THE PEOPLE WHO ARE MOST INVOLVED
14 IN THESE AGREEMENTS HAVEN'T BEEN DEPOSED YET, I REALLY FEEL
15 LIKE YOU INTENTIONALLY WITHHELD THEIR DEPOSITIONS UNTIL AFTER
16 THE CLASS CERT HEARING, OKAY?

17 MR. PURCELL: YOUR HONOR --

18 THE COURT: I'M REALLY DISAPPOINTED BECAUSE THESE
19 ARE THE INDIVIDUALS, LIKE ERIC SCHMIDT IS ON ALL THE E-MAILS
20 THAT WERE IN THIS CMC STATEMENT FROM JANUARY 26TH OF 2012, A
21 YEAR AGO.

22 SO, YOU KNOW, I'M DISAPPOINTED. GIVE ME A DATE FOR
23 MR. LUCAS'S DEPOSITION.

24 MR. PURCELL: I CANNOT GIVE YOU A DATE TODAY. I
25 DON'T KNOW WHEN HE'S AVAILABLE. I JUST DON'T HAVE THAT

1 INFORMATION.

2 THE COURT: OKAY. SO HOW LONG HAS THIS LAWSUIT BEEN
3 PENDING AND YOU'VE NEVER GOTTEN A DATE FOR HIM?

4 MR. PURCELL: YOUR HONOR, MR. LUCAS'S DEPOSITION WAS
5 FIRST REQUESTED IN MID-DECEMBER, NOT IN SEPTEMBER.

6 THERE WAS ONE LUCASFILM WITNESS WHOSE DEPOSITION WAS
7 REQUESTED PRIOR TO THAT. SHE WAS DEPOSED IN LATE OCTOBER OR
8 EARLY NOVEMBER.

9 THE COURT: GIVE ME A DATE BY WHICH YOU'RE GOING TO
10 PROVIDE A DATE.

11 MR. PURCELL: GIVE YOU A DATE BY WHICH WE'RE GOING
12 TO PROVIDE A DATE? HOW ABOUT A WEEK FROM TOMORROW, OR A WEEK
13 FROM FRIDAY, NEXT FRIDAY?

14 THE COURT: I'LL GIVE YOU A WEEK, JANUARY 23RD.

15 ALL RIGHT. WHAT ELSE?

16 MS. DERMODY: FOR INTEL, YOUR HONOR, PAUL OTELLINI.

17 THE COURT: ALL RIGHT. WHEN IS THAT?

18 MS. DERMODY: JANUARY 29TH.

19 THE COURT: OKAY.

20 MS. DERMODY: AND PATRICIA MURRAY, FEBRUARY 14.

21 AND, EXCUSE ME, YOUR HONOR. I CAN ALSO PASS YOU UP THIS
22 LIST IF IT WOULD BE HELPFUL SO YOU DON'T HAVE TO TRY TO GET THE
23 SPELLINGS OF EVERY NAME.

24 THE COURT: OKAY. HAVE THE DEFENDANTS SEEN THAT
25 LIST?

1 MR. SAVERI: I DON'T THINK THEY'VE SEEN THE LIST.

2 MS. DERMODY: I CAN READ IT ALOUD IF THAT WOULD BE
3 HELPFUL AND I CAN PASS IT UP IF IT WOULD BE ACCEPTABLE.

4 MR. SAVERI: THESE REFLECT DATES THAT WE HAVE HAD
5 EXTENSIVE COMMUNICATION WITH THE DEFENDANTS, SO I THINK WITH
6 RESPECT TO EACH DEFENDANT WHOSE EXECUTIVE IS ON THE LIST, THEY
7 KNOW ABOUT IT.

8 BUT WE CAN SHARE IT, READ IT OUT, WHATEVER MAKES SENSE.

9 MS. DERMODY: YES. I JUST WANT TO SAVE THE COURT
10 TIME, YOUR HONOR, BUT I'M HAPPY TO KEEP READING THE LIST.

11 THE COURT: WELL, LET ME SEE THE LIST. CAN YOU JUST
12 SHOW IT TO THE DEFENDANTS?

13 MS. DERMODY: SURE (HANDING).

14 MS. HENN: I WOULD JUST POINT OUT THAT THE LIST HAS
15 NOTES AT THE BOTTOM AND I'M NOT SURE THEY'RE ACCURATE, FOR
16 EXAMPLE, THAT ALL OF THESE WERE REQUESTED IN SEPTEMBER.

17 AS WE JUST HEARD, SOME OF THEM WERE -- AT LEAST MR. LUCAS
18 WAS FIRST REQUESTED IN DECEMBER. SO I JUST WANT TO MAKE SURE
19 THAT THE COURT'S AWARE THAT THAT'S NOT ACCURATE.

20 MR. KIERNAN: DAVID KIERNAN.

21 YOUR HONOR, THERE ARE A FEW DEFENDANTS' WITNESSES THAT
22 WERE MOVED BY PLAINTIFFS, NOT BECAUSE OF ANY ACTION -- FOR
23 EXAMPLE, BRUCE CHIZEN WAS SCHEDULED FOR DEPOSITION IN DECEMBER
24 AND WE ACCOMMODATED MR. SAVERI'S SCHEDULE AND WE WENT TO
25 JANUARY, AND THEN IT HAD TO GET MOVED AGAIN UNTIL FEBRUARY.

1 THE COURT: WHY DID IT HAVE TO MOVE UNTIL FEBRUARY?

2 MR. KIERNAN: THERE WAS ANOTHER SCHEDULING CONFLICT.

3 THE COURT: ON WHOSE PART?

4 MR. KIERNAN: ACTUALLY, I THINK IT MIGHT HAVE BEEN
5 YOURS AS WELL.

6 MR. SAVERI: I BELIEVE ONE OF THEM WAS --

7 MR. KIERNAN: BUT WE'VE BEEN WORKING TOGETHER. I
8 MEAN, THE POINT IS WE'VE BEEN WORKING TOGETHER ABOUT THE
9 SCHEDULING ISSUES. IT HASN'T BEEN QUITE AS CHARACTERIZED -- AS
10 PLAINTIFFS' COUNSEL CHARACTERIZED IT.

11 THE COURT: WHY DON'T YOU JUST LIST THE NAMES AND
12 THE DATES, PLEASE?

13 MS. DERMODY: SURE, YOUR HONOR, YES.

14 FOR ADOBE, MR. BRUCE CHIZEN.

15 THE COURT: SO FOR INTEL, IT'S ONLY MS. MURRAY AND
16 MR. OTELLINI?

17 MS. DERMODY: YES, IN TERMS OF DEPOSITIONS THAT HAVE
18 BEEN SET, YOUR HONOR. THERE ARE MORE THAT WERE REQUESTED.

19 MR. HINMAN: YOUR HONOR, FRANK HINMAN FOR INTEL.

20 BEFORE WE LEAVE MR. OTELLINI, THERE'S JUST A LITTLE BIT OF
21 A DETAIL THERE ACTUALLY HAVING TO DO WITH THIS MOTION THAT'S
22 BEEN FILED WITH RESPECT TO THESE GOOGLE -- THE GOOGLE DOCUMENTS
23 AND THE PRIVILEGE ISSUE BECAUSE MR. OTELLINI, AS I UNDERSTAND
24 IT, IS ALSO ON A NUMBER OF THOSE DOCUMENTS.

25 SO I THINK WE HAVE AN UNDERSTANDING WITH MR. SAVERI THAT

1 THERE MAY BE A CONTINGENCY IN WHICH MR. OTELLINI'S DEPOSITION
2 MIGHT HAVE TO MOVE, BUT I DON'T THINK WE HAVE ANY -- I THINK
3 WE'RE BOTH ON THE SAME PAGE AS TO HOW THAT'S GOING TO WORK, IF
4 IT HAS TO WORK.

5 BUT PLEASE GO AHEAD.

6 THE COURT: OKAY. LET ME -- I'M SORRY. LET ME
7 UNDERSTAND SOMETHING, WHICH I DIDN'T UNDERSTAND WITH THE
8 SEALING REQUEST, EITHER.

9 YOU HAVE THIRD PARTY COMPETITORS, THEY HAVE AGREED TO
10 ENTER INTO THESE AGREEMENTS, AND NO ONE HAS EVER ALLEGED THAT
11 THERE'S A NONDISCLOSURE AGREEMENT.

12 SO WHAT IS THE BASIS FOR CONFIDENTIALITY AND FOR SEALING
13 OF DOCUMENTS OF THIRD PARTY COMPETITORS? OKAY? UNLESS YOU'RE
14 TELLING ME THAT ALL OF THESE CEO'S ARE ACTUALLY CONSULTANTS AND
15 ADVISORS FOR ALL THEIR COMPETITORS, WHICH WOULD REALLY SHOCK
16 ME, WHAT IS THE BASIS FOR AN EXPECTATION OF CONFIDENTIALITY AND
17 OF SEALING?

18 IT HAPPENED TIME AND AGAIN ON THE SEALING REQUEST. YOU
19 HAVE THIRD PARTY COMPETITORS WHO HAVE CHOSEN TO TALK TO EACH
20 OTHER AND SUDDENLY THAT'S -- HOW IS THAT CONFIDENTIAL?

21 MR. RUBIN: MR. OTELLINI IS ON THE BOARD OF
22 DIRECTORS FOR GOOGLE. HE IS A MEMBER OF THE BOARD OF
23 DIRECTORS. AS FAR AS I KNOW, YOU'RE ENTITLED TO HAVE
24 CONFIDENTIAL COMMUNICATIONS WITH YOUR BOARD ON MATTERS RELATING
25 TO RUNNING THE CORPORATION.

1 THE COURT: TELL ME ABOUT THIS EDWARD COLLIGAN FROM
2 PALM AND STEVE JOBS OF APPLE. WHAT IS THE BASIS FOR ANY
3 EXPECTATION OF CONFIDENTIALITY WHEN THEY'RE TALKING TO EACH
4 OTHER?

5 DON'T TELL ME THAT THEY'RE ACTUALLY CONSULTANTS AND
6 ACTUALLY WORK FOR THEIR COMPETITORS. I WOULD FIND THAT REALLY
7 HARD TO BELIEVE.

8 THOSE KINDS OF THINGS JUST KEEP POPPING UP, AND I'M
9 TELLING YOU, THAT'S NOT CONFIDENTIAL AND IT'S NOT GOING TO BE
10 SEALED. UNLESS YOU TELL ME THAT THERE WAS ACTUALLY SOME KIND
11 OF NDA OR SOME BASIS FOR THAT TO BE CONFIDENTIAL, I'M NOT GOING
12 TO SEAL IT.

13 MR. TUBACH: YOUR HONOR, MICHAEL TUBACH FOR APPLE.

14 I DON'T BELIEVE APPLE MOVED TO HAVE THAT SEALED AS
15 CONFIDENTIAL.

16 I BELIEVE PALM DID.

17 THE COURT: ANYWAY, OKAY. SO --

18 MS. DERMODY: YOUR HONOR, IF I MIGHT CLARIFY FOR THE
19 COURT, WE BELIEVE THAT PALM, AS A THIRD PARTY, TRIED TO AVAIL
20 ITSELF UNDER THE PROTECTIVE ORDER IN THE CASE AND THE COURT
21 DISAGREED WITH PALM'S DESIGNATION.

22 SO I THINK ALL THE PARTIES ACCEPT THAT. I WON'T SPEAK FOR
23 DEFENDANTS. PLAINTIFFS EXCEPT THAT.

24 MR. SAVERI: RIGHT.

25 THE COURT: OKAY. SO YOU'RE SAYING WHO ELSE IS ON

1 THESE PRIVILEGED E-MAILS BETWEEN -- WHO IS THE GOOGLE IN-HOUSE
2 LAWYER? WHO IS ON THESE PRIVILEGED E-MAILS?

3 MR. RUBIN: THE GOOGLE -- THERE ARE A NUMBER OF
4 GOOGLE IN-HOUSE, BUT ONE OF THEM BEING KENT WALKER, THE GENERAL
5 COUNSEL. AT OTHER TIMES IT'S LAWYERS WHO WERE INVOLVED IN
6 ASSISTING THE BOARD.

7 SO MR. OTELLINI, AS I SAID, IS ON COMPENSATION COMMITTEE
8 DOCUMENTS WHERE THERE'S PRIVILEGED ADVICE BEING GIVEN TO THE
9 BOARD OF DIRECTORS AND MR. -- IN MR. CAMPBELL'S ROLE AS A
10 SENIOR ADVISER TO THE COMPANY, AND AS I SAID, WE'LL PROVIDE YOU
11 MORE DETAIL ABOUT THE LEGAL STATUS OF THAT RELATIONSHIP --

12 THE COURT: ALL RIGHT. TELL ME HOW MANY PRIVILEGED
13 COMMUNICATIONS ARE THE SUBJECT OF THE MOTION TO COMPEL.

14 MR. RUBIN: WELL, YOUR HONOR, WE'RE ACTUALLY TRYING
15 TO GET THAT BREAKDOWN. I BELIEVE THAT THE -- I BELIEVE
16 PLAINTIFFS LISTED ABOUT 160, BUT I THINK WE'RE -- RIGHT NOW, AS
17 WE SPEAK, WE'RE TRYING TO DE-DUPE THOSE BECAUSE I THINK THERE
18 ARE ACTUALLY SIGNIFICANTLY FEWER E-MAILS AT ISSUE. BUT THAT'S,
19 I THINK, THE NUMBER THAT WERE IDENTIFIED.

20 MS. DERMODY: YES, YOUR HONOR. IT PROBABLY HASN'T
21 COME ACROSS THE COURT'S DESK YET, BUT WE FILED A MOTION TO
22 COMPEL YESTERDAY ON THESE DOCUMENTS WHICH DESCRIBES 166 E-MAILS
23 AND SETS FORTH --

24 THE COURT: I'M GOING TO LET JUDGE GREWAL HANDLE
25 THAT. I MEAN, IT WAS FILED BEFORE HIM.

1 I THOUGHT THERE WAS A DISCRETE AMOUNT. I MEAN, I'M
2 LOOKING AT THE DECEMBER 5TH JOINT CASE MANAGEMENT STATEMENT AND
3 IT LOOKED LIKE IT WAS A VERY DISCRETE NUMBER.

4 MR. RUBIN: AT THAT TIME, YOUR HONOR, I THINK TWO
5 HAD BEEN IDENTIFIED, AND THEN AS PART OF OUR SUPPLEMENTAL
6 PRODUCTION, WE PRODUCED SUPPLEMENTAL LOGS THAT INCLUDED
7 ADDITIONAL E-MAILS THAT INCLUDED MR. CAMPBELL.

8 THE COURT: THAT'S RIGHT. THERE WERE ONLY TWO
9 E-MAILS THAT WERE THE SUBJECT OF THIS ANTICIPATED MOTION TO
10 COMPEL AS OF DECEMBER. BUT YOU'RE SAYING THAT'S GROWN TO 166
11 E-MAILS?

12 MS. DERMODY: YES, BECAUSE THEY PRODUCED PRIVILEGE
13 LOGS SINCE THAT TIME, INCLUDING THOUSANDS OF E-MAILS ON
14 PRIVILEGE LOGS OVER THE HOLIDAYS.

15 SO WE JUST IDENTIFIED THEM AND MOVED TO COMPEL AS QUICKLY
16 AS POSSIBLE. WE HAD A DEPOSITION ON CALENDAR FOR LAST THURSDAY
17 FOR A DEPONENT WHERE WE THOUGHT THESE E-MAILS WOULD BE
18 NECESSARY TO BE PRODUCED BECAUSE THEY WERE ON THAT DEPONENT'S
19 PRIVILEGE LOG AND WE HAD A DISCUSSION WITH DEFENDANTS ABOUT
20 GOING FORWARD WITH THE DEPO AND KEEPING IT OPEN.

21 THEY DISAGREED TO KEEP IT OPEN AND SAID THEY WOULD
22 CONTINUE IT SUBJECT TO OUR MOTION BEING HEARD.

23 SO WE FILED IT ON AN EXPEDITED TIME TABLE AND HOPEFULLY IT
24 WILL BE HEARD SOON.

25 THE CRUX OF THE ISSUE REALLY IS MORE THAN JUST THE NATURE

1 OF THE RELATIONSHIPS, BUT ALSO THE MEANS OF COMMUNICATION.

2 SO WHATEVER THE RELATIONSHIP WAS TO GOOGLE, WHETHER A
3 PERSON WAS ON THE BOARD OF DIRECTORS OR SOMETHING ELSE,
4 GOOGLE'S DECISION TO SEND THOSE E-MAILS WITHOUT ANY EXPECTATION
5 OF PRIVACY TO THEIR COMPETITOR'S E-MAIL ADDRESSES, SO IN
6 MR. CAMPBELL'S CASE, THEY WERE SENDING WHATEVER IT WAS,
7 SENSITIVE, WHAT THEY WOULD CALL PRIVILEGED INFORMATION TO
8 INTUIT.COM WHERE INTUIT ITSELF HAS A PERSONNEL POLICY TELLING
9 ALL EMPLOYEES THAT ANY OF THE COMPUTER SYSTEMS BELONG TO INTUIT
10 AND INTUIT CAN INVESTIGATE THEM AT ANY TIME.

11 THERE SHOULD HAVE BEEN NO EXPECTATION OF PRIVACY. IT WAS
12 A WAIVER OF THE PRIVILEGE IN OUR VIEW.

13 SO WHATEVER YOU FIND THE RELATIONSHIP TO BE SEEMS TO ME TO
14 BE ALMOST BESIDE THE POINT GIVEN HOW THEY FAILED TO PROTECT THE
15 PRIVILEGE AND SENT IT OFF TO THEIR COMPETITOR'S E-MAIL ADDRESS.

16 MR. RUBIN: WELL, OBVIOUSLY, YOUR HONOR, THESE ARE
17 ALLEGATIONS IN THEIR MOTION, BUT THERE'S A SIGNIFICANT FACTUAL
18 SHOWING THAT WE'RE PREPARED TO MAKE, BOTH ON THE NATURE OF THE
19 RELATIONSHIP BEING CONSISTENT WITH PRIVILEGE, AND THE FACT THAT
20 MR. CAMPBELL, IN THE STATUS THAT HE HAD, TREATED THEM WITH
21 CONFIDENTIALITY AND UNDERSTOOD HE HAD A DUTY TO DO SO AND THAT
22 NOBODY EVER REVIEWED OR SAW OR TOOK PART IN PART OF THE REVIEW
23 OF THESE E-MAILS.

24 THE COURT: SO WHO ELSE IS -- I'M SORRY TO INTERRUPT
25 YOU -- WHO ELSE IS ON THESE 166 E-MAILS THAT STILL NEEDS TO BE

1 DEPOSED? ARE THERE OTHERS OTHER THAN MR. OTELLINI?

2 MR. RUBIN: WELL, PERHAPS SHONA BROWN MAY WELL BE ON
3 THEM, AND THOSE ARE THE ONLY OTHER TWO GOOGLE INDIVIDUALS WHOSE
4 DEPOSITIONS HAVE BEEN REQUESTED.

5 MR. SAVERI: EXCUSE ME. MR. CAMPBELL IS ONE OF THE
6 PRIME ACTORS FROM OUR PERSPECTIVE IN THE CONSPIRACY. HE IS --
7 HIS NAME IS ALL OVER THESE DOCUMENTS AND RIGHT NOW I THINK WE
8 HAVE A DATE FOR MR. CAMPBELL'S DEPOSITION ON FEBRUARY 5.

9 MS. DERMODY: YES.

10 MR. RUBIN: I KNOW MS. DERMODY MADE THE REFERENCE TO
11 THE FACT THAT WE GOT THEM TO THEM OVER THE HOLIDAYS. WE
12 ACTUALLY EXPEDITED THEM TO GET THEM TO THEM OVER THE HOLIDAYS
13 AT THEIR REQUEST SO THAT WE COULD TEE THIS ISSUE UP TO THE
14 EXTENT THAT THEY WANTED TO PURSUE IT AS QUICKLY AS WE COULD.
15 SO THE OVER THE HOLIDAYS WAS AT PLAINTIFFS' REQUEST.

16 THE COURT: THAT'S -- WHAT DATE WAS THAT? BECAUSE I
17 THINK JUDGE GREWAL SET THE MOTION FOR FEBRUARY 26TH.

18 IS THAT RIGHT?

19 MS. DERMODY: UNDER NORMAL TIME, AND WE MADE A
20 MOTION FOR SHORTENED TIME, WHICH HAS NOT BEEN RULED ON.

21 MR. SAVERI: SO LET ME ANSWER TWO QUESTIONS. THE
22 DATE FOR MR. CAMPBELL RIGHT NOW IS FEBRUARY 5.

23 WITH RESPECT TO THE MOTION, AS I UNDERSTAND IT, WE HAVE
24 ASKED GOOGLE TO AGREE TO SHORTEN TIME.

25 MR. RUBIN: AND WE'RE PREPARED TO DO THAT. I THINK

1 THE INITIAL REQUEST WAS TO HAVE IT DUE TOMORROW, WHICH WE
2 WEREN'T IN A POSITION TO DO GIVEN THIS WEEK.

3 THE COURT: OKAY. LET'S SET THIS SCHEDULE RIGHT
4 NOW. WHEN ARE YOU GOING TO FILE THE OPPOSITION?

5 MR. RUBIN: WE CAN FILE A RESPONSE --

6 THE COURT: WHEN ARE YOU GOING TO FILE A REPLY?

7 MR. RUBIN: WE CAN FILE A RESPONSE BY NEXT FRIDAY,
8 AND I BELIEVE PLAINTIFFS SAID THEY DON'T NEED A REPLY AND THEY
9 WERE PREPARED TO SUBMIT.

10 AND SO I THINK THAT WE WOULD BE PREPARED TO DO THAT. WE'D
11 BE PREPARED TO SET -- AN EIGHT PAGE BRIEF I THINK IS WHAT THEY
12 PROPOSED, SUBMIT ANY SUPPORTING DECLARATIONS, AND SUBMIT WITH
13 THE EIGHT PAGE BRIEF AND LET EITHER YOUR HONOR OR JUDGE GREWAL
14 DECIDE THE ISSUE.

15 THE COURT: I THINK JUDGE GREWAL --

16 MR. RUBIN: OKAY.

17 THE COURT: -- IS THE DECIDER ON THAT.

18 MS. DERMODY: YES, WE WOULD WAIVE THE REPLY AND WE
19 WOULD WAIVE ARGUMENT JUST TO MOVE THIS ALONG.

20 THE COURT: OKAY.

21 MR. RUBIN: SO WE'LL SEND THAT BY FRIDAY, THE 25TH.

22 THE COURT: THE 24TH. OH, MAYBE I'M LOOKING AT THE
23 WRONG YEAR. I'M SORRY. I'M LOOKING AT THE WRONG YEAR. YOU'RE
24 RIGHT.

25 MR. RUBIN: JANUARY 25TH.

1 THE COURT: I'M A LITTLE BIT UNCLEAR ON HOW THIS
2 DOCUMENT DISCOVERY WORKED SO FAR. DID THE DEFENDANTS ONLY
3 PRODUCE DOCUMENTS OF CUSTODIANS THAT ARE IDENTIFIED BY THE
4 PLAINTIFFS?

5 MS. DERMODY: THAT HAS BEEN A POINT OF CONTENTION,
6 YOUR HONOR, ACTUALLY. WE HAVE -- WE BELIEVED FOR SOME TIME
7 THAT IF A WITNESS IS ON THE RULE 26 DISCLOSURE, THEY SHOULD BE
8 A CUSTODIAN BECAUSE THEY WERE IDENTIFIED AS A WITNESS IN THE
9 CASE.

10 IT BECAME CLEAR TO US OVER TIME THAT THAT WASN'T ALWAYS
11 THE PRACTICE OF EVERY DEFENDANT, AND WE'VE HAD -- AS THE COURT
12 MIGHT HAVE SEEN IN THE DECEMBER 12TH CMC STATEMENT THAT WE
13 PREVIOUSLY SUBMITTED, THERE WAS A LOT OF DISAGREEMENT BETWEEN
14 THE PARTIES ABOUT WITNESSES AND THE TIMING OF DISCLOSING
15 WITNESSES.

16 I THINK THAT WE NOW AT LEAST HAVE MADE CLEAR OUR REQUEST
17 THAT EVERYONE WHO'S ON DEFENDANTS' RULE 26 DISCLOSURE LIST
18 SHOULD BE A CUSTODIAN AND THEIR DOCUMENTS SHOULD BE DISCLOSED.
19 PRESUMABLY WE'LL TAKE THE DEPOSITIONS OF ALL OF THOSE PEOPLE.

20 WE -- AS WE'RE GETTING MORE DOCUMENTS, WE'VE BECOME AWARE
21 OF THE PEOPLE WHO ARE MOST INSTRUMENTAL IN THE CHAIN AND WE, AS
22 QUICKLY AS WE CAN, RAISE THOSE ISSUES WITH THE DEFENDANTS.

23 WE'VE HAD VERY EXTENSIVE MEET AND CONFERS WITH A NUMBER OF
24 DEFENDANTS, INCLUDING APPLE AND GOOGLE, TRYING TO ACCOMMODATE
25 RESISTANCE OF THE DEFENDANTS TO SOME OF OUR WITNESS LISTS AND

1 WE'VE CUT DOWN WITNESS LISTS AND WE'VE TRIED TO REDUCE
2 REDUNDANCIES.

3 IT'S A CHALLENGE WITH THOSE COMPANIES. GOOGLE IN
4 PARTICULAR HAD SUCH A BIG RECRUITING DEPARTMENT THAT FOR US TO
5 GET A SENSE OF HOW THINGS WERE DONE, WE THOUGHT WE HAD TO GET A
6 FEW MORE PEOPLE THAN WE HAD INITIALLY REQUESTED. THAT'S AN
7 ONGOING DEBATE WITH THEM. WE MIGHT HAVE TO COME BACK TO THE
8 COURT ON THAT.

9 SO FAR I THINK THAT WE'RE WORKING PRETTY SMOOTHLY, BUT
10 THERE HAVE BEEN SOME HICCUPS IN THE ROAD.

11 THE COURT: SO THERE'S NO DOCUMENT REQUEST THAT
12 SAYS, YOU KNOW, "PRODUCE ALL DOCUMENTS THAT YOU INTEND TO RELY
13 ON AT TRIAL OR FOR THE CLASS CERTIFICATION MOTION"?

14 MS. DERMODY: YEAH.

15 MR. SAVERI: WE -- I THINK ACTUALLY THERE'S MORE
16 THAN ONE THAT SAYS, IN SUM OR SUBSTANCE, THAT.

17 THE COURT: OKAY. BECAUSE I DIDN'T UNDERSTAND WITH,
18 FOR EXAMPLE, MS. MAUPIN, LUCASFILM SAYS, "WELL, WE PROPOSED
19 ONLY 16 KEY CUSTODIANS OUT OF THE PLAINTIFFS' LIST OF 57, AND
20 THEY NEVER RESPONDED TO OUR LETTER, SO WE HAD NO OBLIGATION TO
21 DISCLOSE THE DOCUMENTS OF ANYONE OTHER THAN OUR 16, EVEN IF WE
22 WERE INTENDING TO RELY ON THESE INDIVIDUALS IN OUR OPPOSITION
23 TO CLASS CERT."

24 I THOUGHT THAT WAS KIND OF A WEAK ARGUMENT.

25 MR. PURCELL: I'M NOT SURE, DID WE ACTUALLY SAY

1 THAT? I'M NOT SURE THAT WE SAID EXACTLY THAT.

2 WHAT WE SAID WAS THAT WE HAD A MEET AND CONFER WITH THEM,
3 WE WERE TRYING TO IMPOSE A REASONABLE LIMIT ON THE NUMBER OF
4 CUSTODIANS AND WE MADE A COUNTER PROPOSAL THAT THEY NEVER
5 RESPONDED TO.

6 AT THE POINT THAT WE HAD THAT DISCUSSION, THAT WAS IN
7 MARCH OF LAST YEAR. MS. MAUPIN --

8 THE COURT: SO TELL ME, FOR THE ENTIRE YEAR, SINCE
9 MARCH, YOU'VE ONLY BEEN PRODUCING DOCUMENTS AS TO THE 16 PEOPLE
10 THAT YOU UNILATERALLY SELECTED --

11 MR. PURCELL: WE DIDN'T UNILATERALLY --

12 THE COURT: -- AS THE CUSTODIANS?

13 MR. PURCELL: WE DIDN'T UNILATERALLY SELECT THEM.
14 WE SELECTED THEM --

15 THE COURT: OUT OF THE 57.

16 MR. PURCELL: -- IN A MEET AND CONFER WITH
17 PLAINTIFFS, AND IF THEY HAD A COUNTER PROPOSAL, WE WOULD EXPECT
18 THEM TO MAKE A COUNTER PROPOSAL.

19 THE COURT: OKAY. SO IF THERE ARE ANY OTHER
20 WITNESSES YOU ARE INTENDING TO RELY ON AT TRIAL, YOU ARE NOT
21 PRODUCING THEIR DOCUMENTS BECAUSE THEY'RE NOT ON YOUR LIST OF
22 16?

23 MR. PURCELL: WE'VE SUBSEQUENTLY HAD ADDITIONAL MEET
24 AND CONFERS AND WE'VE PRODUCED FROM OTHER CUSTODIANS, INCLUDING
25 MS. MAUPIN WHO, BY THE WAY, WAS NOT ADDED TO OUR INITIAL

1 DISCLOSURES UNTIL SEPTEMBER OF THIS YEAR. SHE WAS ADDED A
2 LITTLE LATER, BUT IN PLENTY OF TIME TO BE DEPOSED AND TO HAVE
3 HER DOCUMENTS PRODUCED, BOTH OF WHICH THINGS ARE SCHEDULED AND
4 ARE GOING TO BE COMPLETED IN THE NEXT FEW WEEKS.

5 THE COURT: WHEN DID YOU FIRST PRODUCE DOCUMENTS FOR
6 MS. MAUPIN?

7 MR. PURCELL: WE PRODUCED THE VAST VOLUME OF WHAT WE
8 CALL TRACK ONE DOCUMENTS EARLIER THIS YEAR, I THINK IN THE
9 MIDDLE OF THE YEAR, WHICH CONSISTS BASICALLY OF ALL OF
10 LUCASFILM'S COMPENSATION DATA, ALL OF THE THINGS THAT
11 DR. LEAMER PURPORTED TO RELY ON IN HIS REPORT.

12 WE HAVE SOME ADDITIONAL DOCUMENTS FROM MS. MAUPIN THAT ARE
13 IN PROCESS NOW AND THAT ARE GOING TO BE PRODUCED AROUND
14 FEBRUARY 1ST.

15 AND THAT WAS --

16 THE COURT: I DON'T UNDERSTAND. WHY ARE YOU -- YOU
17 RELY ON HER DECLARATION FOR YOUR OPPOSITION THAT'S FILED, WHAT,
18 IN DECEMBER, AND THEN YOU PRODUCE HER DOCUMENTS IN FEBRUARY?

19 MR. PURCELL: WELL, THEY ASKED FOR THE DOCUMENTS AND
20 THEY ASKED FOR THE DEPOSITION IN DECEMBER OR NOVEMBER.

21 YOUR HONOR, I DON'T BELIEVE THERE'S ANY OBLIGATION THAT
22 EVERYBODY ON YOUR RULE 26 DISCLOSURE HAS TO BE A DOCUMENT
23 CUSTODIAN. I JUST DON'T THINK THAT'S THE LAW. THAT'S NOT IN
24 THE RULE.

25 THE COURT: WELL, I THINK THERE'S BEEN A DOCUMENT

1 REQUEST THAT YOU PRODUCE DOCUMENTS THAT YOU INTEND TO RELY ON
2 FOR YOUR DEFENSES, SO WHY WOULD THAT NOT INCLUDE WHATEVER YOU
3 HAVE FOR MS. MAUPIN?

4 MR. PURCELL: WELL, IT IS INCLUDING IT. I MEAN, WE
5 ARE PRODUCING THEM NOW.

6 THE COURT: YOU'RE PRODUCING THEM FEBRUARY 1ST AFTER
7 YOU'VE ALREADY RELIED ON HER DECLARATION FOR YOUR OPPOSITION
8 FOR YOUR EXPERT REPORT. I THINK THAT'S PROBLEMATIC.

9 MR. PURCELL: I GUESS I WOULD DISAGREE, YOUR HONOR.
10 I DON'T SEE WHY THAT'S PROBLEMATIC.

11 THEY RAISED THE ISSUE, OBVIOUSLY --

12 THE COURT: WOULD YOU BE SATISFIED IF YOU DIDN'T
13 HAVE THE PLAINTIFFS' DOCUMENTS AND YOU'RE REQUIRED TO FILE AN
14 OPPOSITION TO THEIR MOTION FOR CLASS CERT WITHOUT HAVING ALL
15 THE PLAINTIFFS' DOCUMENTS AND THE PLAINTIFFS COME IN AND SAY,
16 "WELL, WE'RE PRODUCING THEM ON FEBRUARY 1ST"?

17 MR. PURCELL: WELL, I MIGHT RAISE THE ISSUE, YOUR
18 HONOR.

19 BUT THEY HAD THE OPPORTUNITY TO ASK FOR ADDITIONAL
20 CUSTODIANS, INCLUDING MS. MAUPIN -- THEY KNEW WHO MS. MAUPIN
21 WAS -- AND THEY NEVER RESPONDED TO A LETTER THAT WE SENT THEM
22 SAYING "WE THINK 57 CUSTODIANS IMPOSES AN UNREASONABLE BURDEN.
23 HOW ABOUT THESE 16 WHICH ARE THE CORE PEOPLE?"

24 WE NEVER HEARD FROM THEM FOR SIX TO EIGHT MONTHS. THAT'S
25 NOT DILIGENCE, YOUR HONOR.

1 THE COURT: A CASE OF THIS MAGNITUDE -- YOU THINK 57
2 CUSTODIANS IS TOO MUCH TO COLLECT DOCUMENTS FROM IN A CASE OF
3 THIS MAGNITUDE?

4 MR. PURCELL: IN A COMPANY OF 400 WORKERS, YES, YOUR
5 HONOR.

6 AND IN ANY EVENT, IF THEY DISAGREED, WHICH THEY DID
7 EVENTUALLY AFTER THE FACT, THEY HAD AN OBLIGATION TO BE
8 DILIGENT AND FOLLOW UP WITH US, WHICH THEY DIDN'T DO. THEY
9 CAN'T SIT ON THEIR HANDS FOR SIX TO EIGHT MONTHS AND THEN COME
10 IN AND COMPLAIN THAT WE DIDN'T PRODUCE SOMETHING.

11 MS. DERMODY: WELL, YOUR HONOR, I THINK IT'S A
12 LITTLE UNFAIR TO CHARACTERIZE OUR ACTION THAT WAY. I MEAN, WE
13 HAD TO RELY, AS YOU DO WHEN YOU HAVE NO INFORMATION, ON THE
14 GOOD FAITH OF THE DEFENDANTS IN PRODUCING THE RELEVANT
15 DOCUMENTS, THE CORE DOCUMENTS.

16 WHEN MID-JUNE CAME AND WENT AND WE HAD A CHANCE TO LOOK AT
17 DOCUMENTS, WHAT IT REVEALED TO US IS WE WERE MISSING A LOT AND
18 WE GOT BACK TO DEFENDANTS WITH NAMES AS THEY CAME TO US.

19 IT WAS A SURPRISE TO US, QUITE CANDIDLY, WHEN WE
20 DISCOVERED THAT THE DEFENDANTS' EXPERT HAD BEEN TALKING TO
21 WITNESSES, DOING INTERVIEWS OVER THE SUMMER, AND THAT THOSE
22 PEOPLE WERE NOT DOCUMENT CUSTODIANS AND THOSE DOCUMENTS WEREN'T
23 PRODUCED TO US AND WE WERE STILL EXPECTED TO TELL THE
24 DEFENDANTS, "THESE PEOPLE THAT YOUR EXPERT THOUGHT WERE
25 IMPORTANT ENOUGH TO INTERVIEW, THE PLAINTIFFS HAVE TO COME

1 FORWARD AND TELL YOU TO PRODUCE THOSE DOCUMENTS."

2 SO WE HAVE DONE THAT. WE HAVE COME FORWARD AND WE HAVE
3 REQUESTED THINGS, AND SOMETIMES WE'VE HAD TO NEGOTIATE FOR
4 WEEKS ON SOMETHING AS SIMPLE AS THAT.

5 BUT WE HAVE DONE IT AND WE THINK THAT WE'RE DOING
6 EVERYTHING THAT WE CAN TO GET THE DOCUMENTS AS QUICKLY AS
7 POSSIBLE.

8 BUT THE NOTION THAT WE'RE SITTING ON OUR HANDS I DON'T
9 THINK IS A VERY FAIR ASSESSMENT OF WHAT HAS HAPPENED SO FAR FOR
10 PLAINTIFFS.

11 THE COURT: IF AT SUMMARY JUDGMENT ANY PARTY RELIES
12 ON THE DECLARATION OF A WITNESS THAT THEY HAVE NOT PREVIOUSLY
13 PRODUCED DOCUMENTS FOR, I'M GOING TO STRIKE THAT DECLARATION.

14 MR. PURCELL: UNDERSTOOD, YOUR HONOR.

15 THE COURT: OKAY? SO I'M REALLY DISPLEASED WITH THE
16 DEFENDANTS ON THIS EMPLOYEE ISSUE AND I'M GOING TO STRIKE
17 SEVERAL OF THOSE DECLARATIONS, IF NOT ALL OF THEM. I FIND THIS
18 TO BE GAMESMANSHIP AND I'M REALLY DISAPPOINTED.

19 I HAD HOPED THAT I'D MADE IT CLEAR AT PREVIOUS CMC'S THAT
20 I REALLY DIDN'T WANT TO SEE THIS KIND OF GAMESMANSHIP, SO TO
21 PLAY HIDE THE BALL AND THEN SAY, "WELL, IT'S THEIR OBLIGATION
22 TO BE ABLE TO LOOK THROUGH OUR OPAQUE COMPANY AND FIGURE OUT
23 WHO IS THE RELEVANT PERSON THEY SHOULD ASK FOR DOCUMENTS FROM"
24 WHEN THEY'RE NOT ON YOUR INITIAL DISCLOSURES IN MOST INSTANCES,
25 I'M JUST VERY DISAPPOINTED.

1 ANYWAY, ALL RIGHT. LET'S GO THROUGH WITH THE REST OF THE
2 DEPOSITIONS. THESE ARE GOING TO BE SCHEDULED AND THESE ARE
3 GOING TO GO FORWARD.

4 MS. DERMODY: THANK YOU, YOUR HONOR.

5 FOR PIXAR, WE HAVE ED CATMULL, C-A-T-M-U-L-L, ON
6 JANUARY 24TH.

7 FOR INTUIT, BILL CAMPBELL, FEBRUARY THE 5TH. AND WE
8 TALKED ABOUT HIM EARLIER AND THE DOCUMENTS THAT ARE
9 OUTSTANDING.

10 AND THEN WE HAVE REQUESTED QUITE A FEW WITNESSES FROM
11 APPLE THAT HAVE NOT BEEN SCHEDULED.

12 THE COURT: OKAY. WHO HAVE YOU REQUESTED?

13 MS. DERMODY: SO ON THE RULE 26 DISCLOSURES, THERE
14 ARE ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN, EIGHT, NINE PEOPLE
15 THEY'VE LISTED. WE'VE REQUESTED ALL OF THEM. I CAN GIVE YOU
16 THE NAMES IF YOU'D LIKE, YOUR HONOR.

17 THE COURT: AND YOU DON'T HAVE ANY DATES?

18 MS. DERMODY: NO DATES.

19 THE COURT: ALL RIGHT. WHO'S HERE FROM APPLE? IS
20 THAT MR. TUBACH?

21 MR. TUBACH: YES.

22 THE COURT: GIVE ME A DATE BY WHICH YOU'RE GOING TO
23 PROVIDE DATES FOR THE WITNESSES.

24 MR. TUBACH: I CAN GIVE YOU THE DATES, SAME AS FOR
25 GOOGLE, A WEEK FROM FRIDAY IF THAT'S OKAY WITH THE COURT.

1 THE COURT: WHEN DID YOU REQUEST THESE DEPOSITIONS?

2 MR. TUBACH: DECEMBER 17TH, YOUR HONOR, IN ONE
3 LETTER THEY SENT TO ALL DEFENDANTS SAYING, "WE WANT DATES FOR
4 EVERY PERSON ON YOUR RULE 26 LIST."

5 THE COURT: ALL RIGHT. SO THAT WOULD BE
6 JANUARY 25TH.

7 ALL RIGHT. WHO ELSE DO YOU NEED?

8 MS. DERMODY: YOUR HONOR, THAT SO FAR IS THE LIST OF
9 NAMES THAT I HAVE.

10 AS I MENTIONED, WE HAVE REQUESTED ALL THE RULE 26 PEOPLE
11 FROM ALL DEFENDANTS. WE HAVE NOT RECEIVED EVERYONE'S
12 WITNESSES.

13 AND WE HAVE BEEN WORKING WITH GOOGLE ON AN ADDITIONAL
14 GROUP OF CUSTODIANS. I IMAGINE THAT WE ARE GOING TO REQUEST
15 DEPOSITION DATES FOR ALL OF THEM OR SOME SUBSET OF THEM.

16 THE COURT: OKAY. I DO WANT TO TALK ABOUT
17 CUSTODIANS -- I'M SORRY TO INTERRUPT YOU.

18 WHAT ABOUT DEBORAH CONRAD? SHE WAS IN YOUR CMC STATEMENT.
19 HAS SHE BEEN DEPOSED OR NOT? I HAD ON MY LIST THAT IT WAS
20 PATRICIA MURRAY, THE SENIOR VICE-PRESIDENT --

21 MR. SAVERI: YES.

22 MR. HINMAN: YOU TOOK THAT DEPOSITION.

23 MR. SAVERI: I TOOK DEBORAH CONRAD'S DEPOSITION.

24 THE COURT: OKAY. SO THAT'S DONE.

25 MR. SAVERI: THAT'S DONE.

1 THE COURT: SO ANYONE ELSE THAT NEEDS TO BE DEPOSED,
2 OTHER THAN THE ONES THAT YOU'VE LISTED?

3 MR. SAVERI: THAT WE'VE -- AGAIN, MS. DERMODY
4 IDENTIFIED WHERE WE ARE WITH GOOGLE.

5 AND YOU KNOW, OF COURSE PART OF THE PROBLEM WE FACE, YOUR
6 HONOR, IS THAT WHEN WE REVIEW DOCUMENTS, WE MAY FIND ADDITIONAL
7 WITNESSES.

8 BUT TO THE BEST OF OUR RECOLLECTION AT THIS POINT, WE'VE
9 GIVEN YOU A COMPLETE LIST OF WHO WE'VE IDENTIFIED AND REQUESTED
10 AT THIS TIME.

11 THE COURT: ALL RIGHT.

12 MS. DERMODY: I'M SORRY --

13 THE COURT: LET'S TALK ABOUT THE DOCUMENT REQUESTS.

14 MR. SAVERI: I'M SORRY. DID I MISSPEAK?

15 MS. DERMODY: I WANT TO MAKE SURE THE RECORD IS
16 CLEAR.

17 FOR APPLE, YOUR HONOR, I DID SAY THERE ARE OUTSTANDING
18 RULE 26 WITNESSES. THERE IS ALSO ONE SEPARATE WITNESS,
19 TIM COOK, THAT THERE'S BEEN A NEGOTIATION FOR A WHILE ABOUT A
20 DATE, I BELIEVE, FOR TIM COOK, AND IF THAT CAN BE ON THE LIST
21 FOR NEXT FRIDAY OF SOMEONE TO SCHEDULE --

22 MR. TUBACH: NO, YOUR HONOR, WE HAVEN'T AGREED TO
23 PRODUCE TIM COOK FOR DEPOSITION. HE WAS ON OUR RULE 26 LIST.
24 WE AMENDED THAT LIST, PROVIDED IT TO PLAINTIFFS, AND TOOK HIM
25 OFF THE LIST.

1 BASED ON THE DEPOSITIONS OF TWO APPLE WITNESSES, THEY
2 CONFIRM THAT MR. COOK WAS NOT INVOLVED AND DOES NOT HAVE
3 FIRSTHAND KNOWLEDGE OF ANY OF THESE AGREEMENTS AND DOES NOT
4 HAVE DISCOVERABLE INFORMATION, SO WE REMOVED HIM FROM THE RULE
5 26 LIST.

6 PLAINTIFFS TOLD US TWO DAYS AGO THAT THEY DISAGREED WITH
7 THAT, SO IF THAT NEEDS TO BE BROUGHT TO THE --

8 THE COURT: WHEN DID HE ASSUME HIS ROLE? I MEAN, I
9 KNOW HE'S BEEN AT APPLE FOR A VERY LONG TIME.

10 MR. SAVERI: WELL, AND THAT'S -- YOUR HONOR, HIS
11 ROLE HAS CHANGED, AND IT CHANGED IN A SIGNIFICANT WAY. HE
12 BECAME MORE SENIOR WITH THE PASSAGE OF TIME IN THE COMPANY. I
13 DON'T KNOW EXACTLY WHEN THE DATES ARE.

14 THE COURT: WAS IT DURING THE CLASS PERIOD?

15 MR. SAVERI: YES.

16 THE COURT: IT'S BEFORE 2009?

17 MR. SAVERI: YES. SO THERE ARE DOCUMENTS, WE
18 BELIEVE, AND WE -- THIS IS PART OF THE DISAGREEMENT. THERE ARE
19 DOCUMENTS, RELEVANT DOCUMENTS IN THIS CASE THAT, FRANKLY, WE
20 THINK ARE GOING TO BE EVIDENCE AT TRIAL THAT MR. COOK RECEIVED
21 AND HAS KNOWLEDGE OF.

22 THE COURT: WHEN -- I KNOW HE'S HAD VARIOUS ROLES.
23 TELL ME WHAT HIS ROLE WAS BEFORE DECEMBER OF 2009.

24 MR. RILEY: YOUR HONOR, HE WAS THE -- THIS IS
25 GEORGE RILEY FOR APPLE -- HE WAS THE CHIEF OPERATING OFFICER OF

1 THE COMPANY. HE HAD NO ROLE IN H.R., NO ROLE IN RECRUITING.

2 SUBSEQUENT, AFTER MR. JOBS HAD AN OPERATION, HE BECAME
3 ACTING CEO.

4 LATER WHEN MR. JOBS RETURNED TO THE COMPANY, MR. COOK
5 BECAME CEO IN AUGUST OF 2011, WELL AFTER THE CLASS PERIOD.

6 THE COURT: WELL, I JUST FIND IT REALLY HARD TO
7 BELIEVE THAT A CHIEF OPERATING OFFICER WOULD HAVE NO SAY OVER
8 SALARIES AND COMPENSATION OF ALL OF THE EMPLOYEES OF THE
9 COMPANY.

10 MR. RILEY: AT APPLE --

11 MR. SAVERI: EXCUSE ME.

12 MR. RILEY: AT APPLE, THE CHIEF OPERATING OFFICER
13 WORKS ON OPERATIONS. THE COMPENSATION OFFERS ARE SET BY THE
14 COMPENSATION COMMITTEE.

15 MR. COOK HAD NO REPORTING OBLIGATIONS, NO REPORTING LINES
16 AT ALL TO THE COMPENSATION COMMITTEE. THE H.R. DIRECTOR AT
17 APPLE REPORTS DIRECTLY TO THE CEO, MR. JOBS.

18 SO, YOUR HONOR, THAT'S WHY WE -- THEY TOOK THE
19 DEPOSITION --

20 THE COURT: SO SOMEONE IN CHARGE OF OPERATION HAS NO
21 SAY OR NO KNOWLEDGE ABOUT THE GREATEST PROBABLY EXPENSE OF
22 OPERATIONS, WHICH IS SALARIES AND COMPENSATION OF EMPLOYEES?

23 MR. RILEY: OBVIOUSLY HE WOULD HAVE THE SAME
24 KNOWLEDGE AS ANY EXECUTIVE OFFICER WOULD OF THE BUDGET.

25 BUT IN TERMS OF ACTUALLY SETTING COMPENSATION LEVELS FOR

1 THE COMPANY COMPANY-WIDE, HE DID NOT PLAY A ROLE IN THAT.

2 AND THEY HAVE HAD AN OPPORTUNITY TO DEPOSE THOSE
3 INDIVIDUALS WHO DID PLAY THOSE ROLES.

4 AND, YOUR HONOR, THEY HAVE NOT PRODUCED IN THIS CASE ANY
5 E-MAIL THAT HAS MR. COOK'S NAME ON IT THAT RELATES TO THESE
6 AGREEMENTS AT ALL.

7 THE COURT: HAVE YOU PRODUCED MR. COOK'S DOCUMENTS?

8 MR. SAVERI: WELL, I'M SORRY, THEY ARE MR. COOK'S
9 DOCUMENTS.

10 THE COURT: I KNOW. THAT'S WHAT I'M ASKING. I'M
11 ASKING -- YOU'RE SAYING PLAINTIFFS HAVEN'T PRODUCED A SINGLE
12 E-MAIL FROM MR. COOK.

13 SO LET ME ASK YOU, HAVE YOU PRODUCED MR. COOK'S E-MAILS?
14 BECAUSE YOU WOULD HAVE THEM MORE THAN THE PLAINTIFFS.

15 MR. RILEY: WE --

16 THE COURT: HAS THERE BEEN ANY DOCUMENT COLLECTION
17 OF MR. COOK'S DOCUMENTS SUCH THAT THE PLAINTIFFS COULD HAVE
18 POINTED TO A DOCUMENT, THE RELEVANT DOCUMENT THAT HE WOULD BE
19 LISTED AS A RECIPIENT OR SENDER?

20 MR. RILEY: YES, YOUR HONOR. IN CONNECTION WITH THE
21 DEPARTMENT OF JUSTICE INVESTIGATION, WE DID A SEARCH AND WE
22 PRODUCED DOCUMENTS, AND I BELIEVE THEY HAVE GOTTEN A HANDFUL OF
23 DOCUMENTS, NOT RELEVANT TO THESE AGREEMENTS, THAT HAVE
24 MR. COOK'S NAME ON THEM.

25 BUT THAT'S -- THAT IS THE POINT, YOUR HONOR, AND THAT'S

1 WHY THEY HAVEN'T ASKED FOR HIS DEPOSITION ANY EARLIER IS THAT
2 HE DID NOT PLAY A ROLE IN THESE AGREEMENTS.

3 THE COURT: WHEN WAS THE DOCUMENT PRODUCTION IN THE
4 D.O.J. CASE?

5 MR. SAVERI: WHEN WAS IT? AGAIN, I DON'T KNOW. IT
6 WAS THEIR PRODUCTION.

7 MR. RILEY: YOUR HONOR --

8 MR. SAVERI: IT WAS PRESUMABLY SOME TIME DURING THE
9 PROCEEDING.

10 MR. RILEY: YOUR HONOR, WE DID THOROUGHLY SEARCH AND
11 PRODUCE FOR MR. COOK. HE WAS A CUSTODIAN.

12 THE COURT: I JUST DON'T THINK THAT HIS ROLE -- IF I
13 REMEMBER CORRECTLY THE DATES OF THAT D.O.J. CASE, I THINK IT
14 MAY HAVE PRECEDED HIS SORT OF ASCENDENCY AT THE COMPANY.

15 MR. SAVERI: AND YOUR HONOR, IF I MAY, I MEAN, I --
16 THERE'S AT LEAST ONE DOCUMENT, I BELIEVE, THAT IS -- THAT HAS
17 RELEVANT INFORMATION THAT THE DEFENDANTS DID PRODUCE TO US. I
18 DON'T KNOW THE GENESIS OF IT AND WHOSE FILE IT CAME FROM, BUT
19 IT HAS MR. COOK'S NAME ON IT.

20 AND MR. COOK, WE BELIEVE, FROM WHAT WE UNDERSTAND, WAS
21 AWARE OF APPLE'S DO NOT COLD CALL LIST AND SO WE THINK HE'S A
22 PERCIPIENT WITNESS.

23 AND IT STANDS TO REASON THAT SOMEONE AT THAT LEVEL IN THE
24 COMPANY KNEW ABOUT THE EXISTENCE OF THE DO NOT COLD CALL LIST,
25 KNEW ABOUT WHAT WAS GOING ON WITH RESPECT TO COMPENSATION.

1 BUT AGAIN, YOUR HONOR, WE'D LIKE TO PUT HIM UNDER OATH AND
2 ASK THE QUESTIONS. THAT'S THE WAY THE PROCEDURE WORKS.

3 I MEAN, WE'RE NOT -- THIS ISN'T JUST A WILD GOOSE CHASE.

4 MR. RILEY: YOUR HONOR, WE PRODUCED ALL OF HIS
5 DOCUMENTS. WE UPDATED THAT PRODUCTION AFTER THE D.O.J. CASE.
6 THEY DIDN'T HAVE ANY DOCUMENTS TO MR. COOK THAT RELATE TO THESE
7 AGREEMENTS OR TO THE DO NOT CALL LIST.

8 THEY DEPOSED THE HEADS OF H.R., BOTH PAST AND CURRENT, WHO
9 TESTIFIED UNDER OATH THAT THEY HAD NO DISCUSSIONS WITH MR. COOK
10 WHATSOEVER ABOUT THIS.

11 THE COURT: I'M GOING TO ORDER HIS DEPOSITION.

12 MR. RILEY: YOUR HONOR, WE WOULD LIKE IT LIMITED TO
13 TWO HOURS.

14 THE COURT: I THINK A LIMIT OF HOURS IS REASONABLE.

15 MR. SAVERI: YOUR HONOR, I THINK TWO HOURS IS REALLY
16 ASKING A LOT. PERHAPS --

17 THE COURT: MAKE A COUNTER PROPOSAL.

18 MR. SAVERI: I WOULD SAY HALF A DAY.

19 THE COURT: FOUR HOURS?

20 MR. SAVERI: FOUR HOURS IS FINE.

21 MS. DERMODY: AND WE WOULD ASK, YOUR HONOR, THAT HE
22 BE A DOCUMENT CUSTODIAN SO THAT THAT DEPOSITION BECOMES MORE
23 FRUITFUL THAN JUST ON A BLANK RECORD.

24 MR. RILEY: I WILL SAY FOR THE THIRD TIME, HE WAS A
25 DOCUMENT CUSTODIAN. WE DID PRODUCE HIS DOCUMENTS.

1 THE COURT: WELL, I WOULD JUST ASK THAT YOU CONFIRM
2 THAT.

3 MR. SAVERI: AND MAYBE I DO -- WE NEED TO CLARIFY
4 THIS. WHEN MR. -- WHEN APPLE AFFIRMS THAT HE WAS A DOCUMENT
5 CUSTODIAN, DOES THAT MEAN HE WAS A DOCUMENT CUSTODIAN FOR THE
6 D.O.J. CASE AND THIS CASE OR BOTH? OR --

7 MR. RILEY: BOTH. WE -- EARLY ON IN THIS CASE WE
8 PRODUCED ALL THE DOCUMENTS THAT WE PRODUCED TO THE D.O.J.

9 WE'VE SUBSEQUENTLY SEARCHED HIS DOCUMENTS AS A CUSTODIAN
10 IN THIS CASE. I DON'T KNOW IF I CAN BE ANY CLEARER THAN THAT.

11 MR. SAVERI: THAT'S CLEAR.

12 MS. DERMODY: I MISUNDERSTOOD YOU. YOU'RE -- SO WE
13 UNDERSTAND, YOU'RE SAYING THAT YOU ACTUALLY USED THE SEARCH
14 TERMS AGREED TO IN THIS CASE AGAINST HIS E-DISCOVERY?

15 MR. RILEY: YES.

16 MS. DERMODY: OKAY. THANK YOU.

17 THE COURT: ALL RIGHT. HE'LL BE DEPOSED FOR FOUR
18 HOURS.

19 WHO ELSE? WHO ELSE NEEDS TO BE DEPOSED IN THIS CASE?

20 MS. DERMODY: I THINK THAT'S THE COMPLETE LIST THAT
21 WE HAVE RIGHT NOW, YOUR HONOR. THANK YOU FOR THE OPPORTUNITY.

22 THE COURT: ALL RIGHT. LET'S TALK ABOUT DOCUMENT
23 REQUESTS.

24 WITH REGARD TO KARINE KARPATI, CARSON PAGE, PATRICK FLYNN,
25 YOU'RE GOING TO PRODUCE THEIR DOCUMENTS. I KNOW YOU'RE SAYING

1 THEY'RE LOW LEVEL H.R. PEOPLE. THEIR NAMES ON ARE RELEVANT
2 DOCUMENTS. YOU NEED TO REVIEW AND PRODUCE DOCUMENTS AS TO
3 THEM.

4 LET ME HEAR ABOUT LARRY PAGE AND SERGEY BRIN.

5 MY UNDERSTANDING OF THIS CASE IS THAT THESE AGREEMENTS
6 HAPPENED AT THE HIGHEST LEVELS OF ALL OF THESE COMPANIES AND
7 THE HIGHEST LEVELS OF THESE COMPANIES WERE INVOLVED IN
8 ENFORCEMENT OF THE AGREEMENTS.

9 SO LET ME HEAR WHY LARRY PAGE AND MR. BRIN SHOULD NOT BE
10 CUSTODIANS. GO AHEAD.

11 MR. RUBIN: YOUR HONOR, FIRST OF ALL, WE HAD ALREADY
12 REACHED AT LEAST PARTIAL AGREEMENT ABOUT THE GROUP THAT YOU HAD
13 ALREADY SAID AND WE WOULD AGREE TO SEARCH KARINE KARPATI'S
14 E-MAILS AND I BELIEVE -- WHO WAS THE OTHER -- WHAT WAS THE
15 OTHER NAME?

16 THE COURT: CARSON PAGE AND PATRICK FLYNN.

17 MR. RUBIN: PATRICK FLYNN.

18 THE COURT: IN THE JOINT CASE MANAGEMENT STATEMENT,
19 YOUR POSITION IS THEY ARE TWO LOW LEVEL H.R. PEOPLE AND YOU
20 WOULDN'T GET ANYTHING RELEVANT FROM THEM.

21 MR. RUBIN: AND WE HAD ACTUALLY AGREED THAT BECAUSE
22 KARINE CARPATTI AND CARSON PAGE WERE DUPLICATE, THEY AGREED TO
23 DROP CARSON PAGE. THAT'S PART OF OUR ONGOING DISCUSSION. THAT
24 WAS WHAT THE LETTER SAID.

25 MS. SHAVER: I'M SORRY. ANNE SHAVER FOR PLAINTIFFS.

1 WE'VE HAD ONGOING MEET AND CONFER EFFORTS. WE HAVEN'T
2 REACHED AN AGREEMENT.

3 MR. RUBIN: COULD I ASK PLAINTIFFS' COUNSEL, THAT
4 WAS A PROPOSAL IN THE LAST LETTER, THAT WE DROP CARSON PAGE.

5 MS. SHAVER: AND WE -- THE PROPOSAL WAS DEPENDENT ON
6 A HOST OF AGREEMENTS, ALL THE CUSTODIANS THAT ARE AT ISSUE, AND
7 WE HAVEN'T HEARD BACK FROM YOU YET. SO --

8 MR. RUBIN: RIGHT. SO ANYWAY, I HAD UNDERSTOOD WE
9 HAD REACHED A TENTATIVE AGREEMENT TO DROP CARSON PAGE, BUT KEEP
10 THE OTHER TWO.

11 WITH LARRY PAGE AND SERGEY BRIN, WE HAD AGREED TO, IN
12 CONCEPT, PRODUCE DOCUMENTS, WHICH WE ARE IN THE MIDDLE OF
13 WORKING WITH THE PLAINTIFFS ON PARTICULAR SEARCH TERMS.

14 WE'VE DONE SOME RUNNING OF TERMS AND WE'RE FINDING THERE'S
15 A GOOD NUMBER OF WHAT I'LL CALL FALSE POSITIVES, AND THEY ARE
16 SIGNIFICANT NUMBERS.

17 SO WE'RE SIMPLY TRYING TO NARROW IT DOWN IN A WAY THAT I
18 THINK EACH SIDE CAN LIVE WITH AND THEN RUN THOSE TERMS.

19 SO WE'RE NOT TAKING A POSITION NOT TO RUN THEM. WE'RE
20 JUST SIMPLY SAYING LET'S KEEP THEM NARROWED TO WHAT THE LIKELY
21 ISSUES ARE FOR THOSE TWO CUSTODIANS.

22 THE COURT: ALL RIGHT. YOU'RE GOING TO PRODUCE
23 DOCUMENTS FOR ALL FIVE OF THEM, LARRY PAGE, SERGEY BRIN,
24 KARINE KARPATI, CARSON PAGE, AND PATRICK FLYNN. OKAY?

25 NOW, I WANT TO KNOW THE DATES OF WHEN THESE

1 DOCUMENTS ARE GOING TO BE PRODUCED, OKAY? LET'S START DOING
2 DATES. SO YOU TELL ME.

3 MR. RUBIN: YOUR HONOR, I WOULD THINK FROM THE TIME
4 THAT WE COULD -- WE WOULD TRY TO MEET AND CONFER WITH
5 PLAINTIFFS NEXT WEEK TO AGREE ON IF WE CAN --

6 THE COURT: NO. I WANT A DATE. I DON'T WANT THIS
7 HANGING OUT THERE. I DON'T WANT THIS TO BE BRIEFED AND HAVING
8 TO SET A HEARING AND EVERYTHING LIKE THAT. I WANT A DATE.

9 MR. RUBIN: JANUARY 25TH, SO I WOULD SAY THREE WEEKS
10 FROM THE 25TH, SO WHATEVER THAT DATE IS. THAT WOULD BE
11 FEBRUARY THE 15TH.

12 THE COURT: NOW, I GUESS THIS IS THE PROBLEM. YOU
13 HAVE DEPOSITIONS OF SHONA BROWN HAPPENING JANUARY 30TH AND
14 ERIC SCHMIDT ON FEBRUARY 20TH, AND I'M NOT GOING TO HAVE
15 DELAYED PRODUCTION OF DOCUMENTS BE THE REASON WHY THESE HAVE TO
16 CONTINUE TO BE POSTPONED. SO --

17 MR. RUBIN: WELL, THOSE CUSTODIANS --

18 THE COURT: -- I THINK FEBRUARY 15TH IS TOO LATE.

19 MR. RUBIN: WELL, THOSE DOCUMENTS HAVE BEEN FULLY
20 PRODUCED, SHONA BROWN'S AND ERIC SCHMIDT'S. THOSE DOCUMENTS
21 HAVE BEEN SUBJECT TO INITIAL PRODUCTIONS, SUPPLEMENTAL
22 PRODUCTIONS.

23 SO I CERTAINLY CAN'T TELL YOU THAT THEY WOULDN'T SHOW UP
24 ON AN E-MAIL THAT WASN'T IN THEIR CUSTODIAL FILES AND NOW WOULD
25 BE IN THE OTHERS.

1 BUT I DO THINK THAT, YOUR HONOR, JUST BY WAY OF NECESSITY,
2 THERE'S SOME SEQUENCING THAT HAS TO TAKE PLACE. I MEAN, IN A
3 SITUATION LIKE THIS WHERE I THINK PLAINTIFFS EXPLAINED THEY
4 CAME BACK, THEY ASKED FOR ADDITIONAL NAMES BASED UPON THE
5 PRODUCTION THAT WE HAD MADE, WE'VE THEN GONE BACK AND SAID YES
6 AS TO SOME, WHY AS TO OTHERS.

7 SO THERE HAS TO BE SOME SEQUENCING. OTHERWISE EVERYBODY
8 WOULD WAIT UNTIL -- WE'RE JUST TRYING TO RESPOND TO THE
9 REQUESTS THAT HAVE COME AFTER OUR INITIAL PRODUCTIONS.

10 THE COURT: WELL, I UNDERSTAND. THE PROBLEM IS
11 WE'RE BREATHING DOWN THE NECK OF A MARCH 29TH FACT DISCOVERY
12 CUT OFF AND THE LATER THESE GET PRODUCED, THEN IT'S GOING TO
13 CREATE THIS MAD SCRAMBLE FOR EITHER ANY FOLLOW-UP DISCOVERY
14 REQUESTS OR MORE DEPOSITIONS AND THIS DEADLINE IS LOOMING, SO I
15 NEED IT SOONER THAN THAT.

16 MR. RUBIN: WELL, I THINK WE COULD DO -- I THINK WE
17 COULD DO THE THREE -- WE'VE ALREADY -- THERE WERE FOUR THAT WE
18 HAD ALREADY AGREED TO. I THINK THOSE COULD BE PRODUCED
19 EARLIER.

20 THE THREE, CARSON PAGE AND KARINE KARPATI AND
21 PATRICK FLYNN, PERHAPS THE WEEK BEFORE.

22 THE COURT: OKAY.

23 MR. RUBIN: BUT I REALLY DO -- WE REALLY DO NEED THE
24 TIME, YOUR HONOR, TO PRODUCE THE PAGE AND BRIN DOCUMENTS, SO --
25 WE REALLY DO.

1 SO IF WE -- I CERTAINLY CAN PROPOSE A ROLLING PRODUCTION
2 OVER THE TWO WEEK PERIOD BEGINNING FEBRUARY 1, FEBRUARY 8TH,
3 FEBRUARY 15TH, AND THEN SUBSTANTIALLY COMPLETE THIS
4 SUPPLEMENTAL GROUP THAT WE'RE TRYING TO FOLLOW UP ON AT THEIR
5 REQUEST, THAT WE FINISH BY FEBRUARY 15TH, UNDERSTANDING THAT
6 PAGE AND BRIN MAY TAKE THE LONGEST TIME.

7 THE COURT: WELL, I'D LIKE TO SAY FEBRUARY 1ST FOR
8 KARPATI, PAGE, AND FLYNN. I'M SORRY, CARSON, PAGE, AND FLYNN.

9 MR. RUBIN: CARSON PAGE IS ONE PERSON.

10 THE COURT: FRANKLY --

11 MR. RUBIN: THERE ARE TWO PAGES. THERE'S LARRY PAGE
12 AND CARSON PAGE.

13 THE COURT: KARINE KARPATI, CARSON PAGE, AND
14 PATRICK FLYNN, FEBRUARY 1ST.

15 MR. RUBIN: OKAY.

16 THE COURT: OKAY? I --

17 MR. RUBIN: BUT IF WE COULD HAVE UNTIL THE 15TH,
18 YOUR HONOR, FOR THE OTHER TWO, THAT WOULD -- I'M JUST TRYING TO
19 BE REALISTIC. WE'VE BEEN PRODUCING SUBSTANTIAL AMOUNTS OF
20 DOCUMENTS AND IT'S -- WE NEED THAT TIME.

21 THE COURT: I'LL GIVE YOU UNTIL FEBRUARY 11TH, OKAY,
22 JUST BECAUSE THEY MAY NEED THOSE DOCUMENTS FOR THE ERIC SCHMIDT
23 DEPOSITION ON FEBRUARY 20TH. I DON'T WANT TO KEEP HAVING THE
24 CAN KEEP GETTING KICKED DOWN THE ROAD. WE NEED TO BRING A
25 CLOSE TO ALL OF THIS.

1 ALL RIGHT. LET'S GO TO APPLE. TONY FADELL, YOU'RE GOING
2 TO PRODUCE THE DOCUMENTS.

3 MR. SAVERI: YOUR HONOR --

4 THE COURT: TONY FADELL, F-A-D-E-L-L.

5 HE COMMUNICATED WITH STEVE JOBS ABOUT THE POACHING, AND
6 YOU'RE SAYING HE DOESN'T HAVE RELEVANT DOCUMENTS.

7 MR. TUBACH: YOUR HONOR, THE PLAINTIFFS HAD AGREED
8 TO TAKE HIM OFF THE LIST AND THEY TOOK HIM OFF THE LIST.

9 THEY DID NOT ASK FOR THE DEPOSITION UNTIL TWO DAYS AGO,
10 AND FOR THE FIRST TIME THEY SAID, "WE ADMIT WE'RE CHANGING OUR
11 MINDS AND WE'VE NOW CHANGED OUR MINDS AND WE WANT TONY FADELL
12 AFTER ALL."

13 WE HEARD ABOUT THIS FOR THE FIRST TIME TWO DAYS AGO, YOUR
14 HONOR.

15 THE COURT: WELL, THIS IS BRIEFED IN THE CMC -- THE
16 JOINT CASE MANAGEMENT STATEMENT FOR THE DECEMBER CMC.

17 MR. TUBACH: THAT'S WHY WE FILED AN ADDITIONAL CMC
18 STATEMENT, YOUR HONOR, PROVIDING WHAT ARE THE NOW CURRENT SETS
19 OF DISPUTES, AND WE HAD AGREED WITH THE PLAINTIFFS THAT THEY --
20 THAT THEY WOULD NOT BE DOING TONY FADELL.

21 THE COURT: OKAY. WELL, I --

22 MR. TUBACH: THE PLAINTIFFS HAD AGREED WE DON'T HAVE
23 TO DO TONY FADELL, YOUR HONOR.

24 THE COURT: THESE DOCUMENTS HAVE BEEN RESOLVED?

25 MR. SAVERI: WE DO. WE WANT THE DOCUMENTS.

1 MS. DERMODY: YES.

2 MR. TUBACH: YOUR HONOR, UNTIL TWO DAYS AGO, THE
3 ANSWER WAS NO, AND THAT ANSWER WAS NO FROM NOVEMBER 30TH UNTIL
4 TWO DAYS AGO.

5 MR. SAVERI: YOUR HONOR, WE'D LIKE MR. FADELL'S
6 DOCUMENTS.

7 THE COURT: I MEAN, IF HE COMMUNICATED WITH
8 STEVE JOBS ABOUT THE ANTI-POACHING WITH GOOGLE, I JUST DON'T
9 SEE HOW YOUR POSITION WAS THAT HE DOESN'T HAVE RELEVANT
10 INFORMATION.

11 MR. TUBACH: THE PLAINTIFFS AGREED THEY DIDN'T NEED
12 TO TAKE HIS DEPOSITION OR GET DOCUMENTS, YOUR HONOR. IT'S NOT
13 A MATTER OF OUR POSITION. THEY AGREED WITH IT.

14 AND IF THE PLAINTIFFS WANT TO CHANGE THEIR MIND, WHAT WE
15 ASKED THEM TO DO TWO DAYS AGO, WHICH THEY SHOULD BE REQUIRED TO
16 DO, IS TO AT LEAST SEND US A LETTER. THIS WAS IN A PHONE CALL,
17 YOUR HONOR. THEY SHOULD AT LEAST BE REQUIRED TO SEND US A
18 LETTER AND EXPLAIN TO US WHY THEY WANT TO GO BACK ON AN
19 AGREEMENT THAT WE REACHED TWO MONTHS AGO.

20 MR. SAVERI: AND YOUR HONOR, IF WE WERE TO SEND THE
21 LETTER, IT WOULD BE SOME VERSION OF WHAT YOU JUST SAID.

22 AND WE'RE HAPPY TO SEND MR. TUBACH A LETTER AND WE'RE
23 HAPPY IF HE WANTS TO LOOK AT IT, BUT I CAN PREDICT WITH SOME
24 CERTAINTY THAT WE'RE GOING TO ASK FOR THE DOCUMENTS.

25 MR. TUBACH: I'D LIKE TO SEE WHAT THE LETTER SAYS,

1 YOUR HONOR. SO FAR IT'S BEEN ONE PHONE CALL TWO DAYS AGO WHERE
2 THEY ADMITTED THEY WERE CHANGING THEIR MINDS FROM THE AGREEMENT
3 WE HAD TWO MONTHS AGO, A CALL TWO DAYS AGO.

4 THE COURT: ALL RIGHT. IF HE IS ON CORRESPONDENCE
5 WITH STEVE JOBS ABOUT WHETHER IT'S PERMISSIBLE TO POACH FROM
6 GOOGLE, WHAT WAS THE BASIS OF YOUR POSITION THAT HE HAD NO
7 RELEVANT DOCUMENTS?

8 MR. TUBACH: YOUR HONOR, I DON'T RECALL THE PRECISE
9 DOCUMENT. THAT'S WHY -- WE HAVEN'T THOUGHT ABOUT THIS FOR TWO
10 MONTHS BECAUSE THE PLAINTIFFS AGREED --

11 THE COURT: WELL, THIS IS A DECEMBER 5TH DOCUMENT
12 FOR A DECEMBER 12TH CASE MANAGEMENT CONFERENCE, AND I'M SORRY I
13 WAS IN A PATENT TRIAL AT THAT TIME AND I COULDN'T HAVE THE CMC
14 AND I APOLOGIZE THAT I CONTINUED IT TO TODAY.

15 MR. TUBACH: THAT'S NOT THE COURT'S FAULT.

16 THE COURT: BECAUSE THIS IS NOW JUST -- YOU KNOW,
17 I'M JUST CONCERNED THAT WE'RE RUNNING UP AGAINST THIS DEADLINE
18 OF THE END OF MARCH, AND SO I CAN'T HAVE THESE DISPUTES
19 CONTINUING TO JUST DRAG ON. I MEAN, WE NEED TO COME TO CLOSURE
20 ON THIS.

21 MR. TUBACH: WE CAN COME TO CLOSURE WITH THE
22 PLAINTIFFS ON THIS, YOUR HONOR, AND IF WE CAN-NOT, WE WILL COME
23 BACK TO THE COURT EXPEDITIOUSLY.

24 BUT IT IS SIMPLY NOT FAIR FOR THEM TO CALL US TWO DAYS AGO
25 AND SAY, "YES, WE CHANGED OUR MIND," AND HAVE THE COURT RULE ON

1 IT TODAY. IT'S JUST NOT FAIR.

2 MS. DERMODY: BUT NOW THAT WE'RE ALL HERE --

3 MR. TUBACH: WE WILL ACT EXPEDITIOUSLY TO RESPOND TO
4 THE PLAINTIFFS' REQUEST. WE WILL RESPOND IMMEDIATELY.

5 BUT WE HAVE THE RIGHT TO HEAR WHAT THEY HAVE TO SAY, TO
6 LOOK BACK INTO THE ISSUE, AND TO DECIDE WHETHER OR NOT THIS IS
7 SOMETHING THAT WE WANT TO AGREE TO OR NOT.

8 THE COURT: ALL RIGHT. THIS IS WHAT IT SAYS. THIS
9 IS DEFENDANT'S STATEMENT ON ECF NUMBER NUMBER 245. "WITH
10 RESPECT TO THE SIXTH AND FINAL PROPOSED CUSTODIAN, TONY FADELL,
11 PLAINTIFFS HAVE IDENTIFIED NO SPECIFIC REASON FOR NEEDING HIS
12 DOCUMENTS, APART FROM IDENTIFYING A SINGLE DOCUMENT IN WHICH HE
13 INQUIRED ABOUT APPLE'S 'POACHING' PRACTICES, AND APPLE HAS
14 EXPLAINED THAT IT DOES NOT BELIEVE ADDING HIM AS A CUSTODIAN IS
15 WARRANTED."

16 I JUST --

17 MR. TUBACH: YOUR HONOR, I NEED TO GO BACK AND LOOK
18 AT THAT DOCUMENT. IF IT'S A SINGLE DOCUMENT, IT PROBABLY IS
19 NOT WORTH HAVING THE ENTIRE PRODUCTION --

20 THE COURT: IT'S A SINGLE DOCUMENT BECAUSE YOU
21 HAVEN'T PRODUCED HIS DOCUMENTS. YOU DON'T CONCEDE HE'S A
22 CUSTODIAN, SO YOU HAVEN'T PRODUCED HIS DOCUMENTS. I MEAN, THIS
23 IS REALLY CIRCULAR. YOU'RE SAYING, "WE'RE NOT GOING TO PRODUCE
24 THE DOCUMENTS UNTIL THE PLAINTIFFS CAN POINT TO OUR DOCUMENT
25 THAT SHOWS THAT THIS IS A RELEVANT CUSTODIAN."

1 MR. TUBACH: WE PRODUCED DOCUMENTS --

2 THE COURT: THAT IS A RIDICULOUS BURDEN.

3 MR. TUBACH: THAT'S NOT -- I DON'T BELIEVE IT'S
4 RIDICULOUS FOR THIS REASON, YOUR HONOR.

5 THE COURT: OKAY.

6 MR. TUBACH: WE PRODUCED DOCUMENTS FROM LOTS OF
7 OTHER CUSTODIANS, ALL OF WHOM HAVE BEEN INVOLVED IN ONE WAY OR
8 THE OTHER IN COMPENSATION, IN THE COLLABORATIVE VENTURES, OR IN
9 THE AGREEMENTS, AND THAT'S WHAT WE'VE PRODUCED.

10 AND IF THEY CAN POINT TO ONE E-MAIL, WHICH WE NEED TO GO
11 BACK AND LOOK AT -- IT DEPENDS ON WHAT THE E-MAIL SAYS, YOUR
12 HONOR.

13 THE COURT: IT'S A HIGHLY RELEVANT E-MAIL. IT'S AN
14 E-MAIL TO STEVE JOBS ABOUT POACHING.

15 SO I DON'T GET IT. MR. RILEY MADE THE SAME ARGUMENT,
16 LIKE, "WELL, IF YOU CAN'T POINT TO OUR DOCUMENTS, THEN WE'RE
17 NOT GOING TO PRODUCE THOSE DOCUMENTS."

18 I MEAN, THAT JUST MAKES NO SENSE. YOU HAVEN'T TREATED HIM
19 AS A CUSTODIAN OF RECORD. YOU HAVEN'T COLLECTED HIS DOCUMENTS.

20 YOU'RE SAYING YOU HAVE TO GET HIM ON EVERYONE ELSE'S
21 DOCUMENTS TO PROVE THAT HE'S RELEVANT.

22 WELL, THEY HAVE ACTUALLY FOUND HIM ON A VERY HIGHLY
23 RELEVANT DOCUMENT, AND NOW YOU'RE NOT WILLING TO PRODUCE HIS
24 DOCUMENTS? IT JUST MAKES -- IT MAKES NO SENSE BECAUSE WE ALL
25 KNOW THAT EVEN IF YOU CAPTURE ANOTHER PEOPLE'S E-MAILS, THEY

1 WON'T CAPTURE EVERYTHING THAT YOU HAVE SENT, THAT YOU HAVE
2 RECEIVED. I MEAN, MAYBE HE'S A CC ON SOMEBODY ELSE'S E-MAIL.

3 MR. TUBACH: IT MADE ENOUGH SENSE, YOUR HONOR, THAT
4 THE PLAINTIFFS AGREED TO IT, AND ALL I'M ASKING IS THAT THEY
5 SEND US A LETTER AND GIVE US A CHANCE TO LOOK AT THE E-MAIL
6 AGAIN. WE HEARD ABOUT THIS LITERALLY TWO DAYS AGO, TWO DAYS
7 BEFORE A CLASS CERTIFICATION HEARING. I DON'T BELIEVE WE
8 SHOULD HAVE THIS RESOLVED HERE TODAY.

9 MR. SAVERI: YOUR HONOR, I AM HAPPY TO SEND
10 MR. TUBACH A LETTER, BUT IT'S GOING TO COME AS NO SURPRISE
11 BECAUSE IT'S GOING TO REPEAT BASICALLY WHAT YOUR HONOR JUST
12 SAID TO HIM.

13 BUT IF -- I'M WILLING TO DO THAT.

14 MR. TUBACH: AND WE'LL TAKE AN IMMEDIATE AND CLOSE
15 LOOK AT WHAT THEY SAY AND RESPOND RIGHT AWAY. WE'RE NOT TRYING
16 TO SLOW DOWN --

17 THE COURT: WHICH IS TO DO WHAT? YOU'VE ONLY
18 POINTED TO ONE E-MAIL THAT MR. TUBACH HAS SENT. THAT'S NOT
19 ENOUGH.

20 MR. TUBACH: I'M MR. TUBACH.

21 THE COURT: SHOW ME, WHAT, 10, 25, 30, 75, A
22 THOUSAND TO SHOW THAT HE'S RELEVANT? I MEAN, WHAT'S THE
23 STANDARD HERE? THEY HAVE A DOCUMENT FROM HIM TO STEVE JOBS
24 SAYING, "CAN WE POACH FROM GOOGLE?"

25 MR. TUBACH: IF THAT'S ALL IT IS --

1 THE COURT: THAT'S NOT RELEVANT?

2 MR. TUBACH: IF THAT --

3 THE COURT: THAT'S NOT GOING TO LEAD TO RELEVANT,
4 ADMISSIBLE EVIDENCE?

5 MR. TUBACH: IF THAT'S ALL IT IS AND THERE'S NO
6 RESPONSE, PROBABLY NOT. PROBABLY NOT.

7 IF THERE'S MORE, WE'LL LOOK INTO IT, AND WE'LL LOOK INTO
8 IT IMMEDIATELY. ALL I'M ASKING FOR IS AN OPPORTUNITY.

9 THE COURT: OKAY. BUT YOU'RE SAYING, "WE'RE NOT
10 WILLING TO PRODUCE HIS DOCUMENTS UNTIL THEY SHOW US ENOUGH OF
11 HIS DOCUMENTS TO MAKE US HAVE TO DO A COLLECTION."

12 MR. TUBACH: THAT'S NOT WHAT I'M SAYING, YOUR HONOR.

13 THE COURT: DOES THAT MAKE SENSE? THAT'S WHAT
14 YOU'RE SAYING.

15 MR. TUBACH: NO.

16 THE COURT: YOU'RE SAYING, "THEY NEED TO POINT TO
17 ENOUGH OF HIS DOCUMENTS FOR US TO CONCEDE THAT HIS DOCUMENTS
18 ARE RELEVANT." THAT'S YOUR ARGUMENT. "THEY'RE ONLY POINTING
19 TO A SINGLE DOCUMENT OF HIS TO SHOW THAT HE'S RELEVANT AND,
20 THEREFORE, WE SHOULD DO A COLLECTION OF THIS PERSON'S
21 DOCUMENTS."

22 THAT MAKES NO SENSE TO ME.

23 MR. TUBACH: I'M NOT SAYING THEY HAVE TO POINT TO
24 MORE THAN ONE DOCUMENT FOR US TO CHANGE OUR MIND. I WANT TO
25 TAKE A LOOK AT THE DOCUMENT.

1 THE COURT: OKAY.

2 MR. TUBACH: OBVIOUSLY THE COURT MAY NOT BE
3 PERSUADED.

4 THE PLAINTIFFS WERE PERSUADED BY THE ARGUMENT AND DROPPED
5 HIM TWO MONTHS AGO.

6 SO ALL I WANT TO DO IS TAKE -- WE MAY CHANGE OUR MINDS.
7 WE'VE NOW PRODUCED MORE DOCUMENTS. WE'LL LOOK THROUGH THOSE.
8 WE'LL TALK TO PEOPLE. WE MAY CHANGE OUR MINDS.

9 I'M NOT PUTTING A NUMERIC NUMBER ON HOW MANY E-MAILS HAVE
10 TO BE FROM A PARTICULAR WITNESS BEFORE HE'S A CUSTODIAN. ALL
11 I'M ASKING FOR IS AN OPPORTUNITY TO TAKE A LOOK AT IT, AND
12 WE'LL RESPOND IMMEDIATELY.

13 AND I APPRECIATE MR. SAVERI'S OFFER TO WRITE A LETTER, AND
14 WE'LL RESPOND TO IT IMMEDIATELY.

15 THE COURT: ALL RIGHT. THAT LETTER IS GOING OUT
16 TOMORROW, JANUARY 18TH.

17 MR. TUBACH: THANK YOU.

18 THE COURT: WHEN IS YOUR RESPONSE COMING IN?

19 MR. TUBACH: WE CAN RESPOND BY TUESDAY, THE 22ND.

20 THE COURT: ALL RIGHT. JANUARY 22ND.

21 ALL RIGHT. AND I WANT A STATUS REPORT, YOU ALL FILE A
22 STATUS REPORT BY THURSDAY, THE 24TH, AS TO WHAT'S GOING ON WITH
23 MR. FADELL'S DOCUMENTS. I FIND THAT THEY'RE RELEVANT AND I
24 THINK THEY SHOULD BE PRODUCED, SO I HOPE THAT YOU REACH A
25 SUITABLE AGREEMENT.

1 MR. SAVERI: I DON'T WANT TO PROMISE, BUT I'LL TRY
2 TO GET THE LETTER TONIGHT. I'LL GO BACK AND WRITE A LETTER.

3 THE COURT: WHAT ELSE? I'M TRYING TO BE VERY CLEAR,
4 EVERY TIME WE HAVE A CMC, PLEASE, LET'S NOT HAVE THESE ISSUES.

5 MR. SAVERI: YOUR HONOR --

6 THE COURT: I HAMMERED THE PLAINTIFFS WHEN THEY
7 WEREN'T BEING TIMELY WITH THEIR PRODUCTION. YOU KNOW, IF --
8 IT'S ALL EQUAL OPPORTUNITY HAMMERING. I MEAN, WE NEED TO JUST
9 GET THIS CASE RESOLVED. WE'RE COMING UP AGAINST THE FACT
10 DISCOVERY CUT OFF DATE AND WE JUST NEED THESE ISSUES TO MOVE
11 FORWARD AND THIS CASE TO PROGRESS TO THE MERITS.

12 SO ANYWAY, IS THERE ANY OTHER DISPUTE AS TO APPLE
13 CUSTODIANS OF RECORD?

14 MS. DERMODY: NO, YOUR HONOR, NOT THAT I'M AWARE OF.

15 BUT I WANTED JUST TO GO BACK TO -- ON GOOGLE, WE TALKED
16 ABOUT THE DOCUMENTS, AND I THINK THAT WHAT THAT ALSO HIGHLIGHTS
17 IS THAT THERE IS LIKELY GOING TO NEED TO BE A DISCUSSION ABOUT
18 DEPOSITION DATES FOR CUSTODIANS, AND WE WANTED TO GET AN
19 AGREEMENT WITH GOOGLE ON A DATE CERTAIN WHEN THEY WILL GIVE US
20 THOSE DATES.

21 PROBABLY FOR LARRY PAGE AND MR. BRIN, WE WILL HAVE TO DO
22 DEPOSITIONS IN MARCH GIVEN THE PRODUCTION TIMEFRAME WE'RE
23 TALKING ABOUT.

24 BUT WE WANT TO MAKE SURE WE START TALKING ABOUT SCHEDULES
25 BECAUSE IT'S BEEN VERY HARD TO SCHEDULE THE SENIOR EXECUTIVES.

1 THE COURT: NOW, THAT'S ONLY IF YOU FIND RELEVANT
2 DOCUMENTS WITHIN THEIR PRODUCTION.

3 MS. DERMODY: YES.

4 THE COURT: I CERTAINLY DON'T WANT HARASSMENT
5 DEPOSITIONS JUST TO TIE UP A TOP EXECUTIVE'S TIME AND BURDEN
6 THEM.

7 MS. DERMODY: ABSOLUTELY, YOUR HONOR. WE JUST WANT
8 TO MAKE SURE WE GET --

9 MR. RUBIN: YOUR HONOR, WE'RE CERTAINLY HAPPY TO
10 TALK TO THEM AS SOON AS -- AFTER THEY GET THE DOCUMENTS. I
11 THINK WE'RE ALWAYS WILLING TO TAKE ANYBODY'S CALL FROM
12 LIEFF CABRASER. WE'RE ALWAYS AVAILABLE. WE WILL TALK TO THEM.

13 AS SOON AS THEY LOOK AT DOCUMENTS AND THEY WANT TO TALK
14 ABOUT THE NEED FOR A DEPOSITION AND WHY, WE'LL RESPOND
15 PROMPTLY.

16 BUT I AGREE WITH YOUR HONOR THAT WE'RE NOT QUITE THERE
17 YET. I KNOW THAT MS. DERMODY IS LAYING DOWN A MARKER, BUT
18 WE'RE NOT QUITE THERE YET TO TALK ABOUT THOSE DATES.

19 THE COURT: ALL RIGHT. WELL, PLEASE, EVERYONE BE
20 REASONABLE ABOUT THIS.

21 MS. DERMODY: THANK YOU, YOUR HONOR.

22 THE COURT: ALL RIGHT. SO LET'S FIGURE OUT WHEN WE
23 SHOULD GET TOGETHER AGAIN FOR A CASE MANAGEMENT CONFERENCE.

24 I THINK WE SHOULD PROBABLY DO ONE IN MARCH OR EARLY APRIL,
25 BUT I WOULD LIKE TO HEAR FROM THE PARTIES OF WHEN MAKES SENSE.

1 MR. MITTELSTAEDT: ANY DATE IS FINE WITH US, YOUR
2 HONOR.

3 MS. DERMODY: I THINK MARCH BEFORE THE DISCOVERY CUT
4 OFF MIGHT MAKE SENSE, YOUR HONOR. WE EXPECT THERE WILL BE NO
5 PROBLEM MEETING IT, BUT IT MIGHT BE GOOD TO CHECK IN WITH THE
6 COURT.

7 MR. MITTELSTAEDT: YOUR HONOR, WOULD IT BE OKAY FOR
8 THE PARTIES TO MEET AND CONFER AND AGREE ON A COUPLE OF DATES
9 IN MARCH AND CHECK WITH YOUR STAFF TO SEE IF THAT'S ACCEPTABLE
10 WITH THE COURT?

11 THE COURT: THAT'S FINE. BUT CAN WE NOT DO THAT
12 TODAY?

13 MR. SAVERI: I'M HAPPY TO TALK TO MR. MITTELSTAEDT,
14 BUT IT SEEMS TO ME THAT WE'RE MORE THAN LIKELY TO HAVE DATES
15 THAT WE CAN AGREE ON AND KEEP IF WE DO IT RIGHT NOW.

16 MR. MITTELSTAEDT: I JUST THOUGHT IT WOULD SAVE SOME
17 TIME, BUT EITHER WAY IS FINE WITH US.

18 THE COURT: OKAY. I JUST DON'T WANT TO HAVE A LOT
19 OF LOOSE ENDS.

20 SO WHAT DATES DO WE HAVE IN MARCH?

21 THE CLERK: JUST FROM OUR CALENDAR, IT LOOKS AS
22 THOUGH THE 20TH WOULD BE THE BEST.

23 THE COURT: OKAY. WHAT ABOUT MARCH 20TH? I GUESS
24 IT'LL BE WEDNESDAY AT 2:00 O'CLOCK.

25 THE CLERK: OR THE 6TH ALSO WOULD WORK.

1 THE COURT: LET'S DO IT THE 20TH.

2 MS. DERMODY: IS IT POSSIBLE, YOUR HONOR, TO DO IT
3 THE WEEK BEFORE THAT?

4 THE COURT: I THINK THE 13TH MIGHT BE LONG.

5 THE CLERK: THE 13TH WE HAVE SIX.

6 THE 6TH WE ONLY HAVE THREE.

7 MS. DERMODY: IS THE 6TH IS NOT --

8 THE COURT: BUT IS ONE OF THEM THE PRETRIAL
9 CONFERENCE --

10 THE CLERK: NO. THREE J & J CASES. I DON'T KNOW
11 HOW THAT HAPPENED.

12 MS. DERMODY: DO YOU DO MONDAYS, YOUR HONOR?

13 THE COURT: I WOULD BE HAPPY TO SPECIALLY SET IT IF
14 I DON'T HAVE A TRIAL SET THEN. I JUST DON'T KNOW. LET ME SEE.

15 THE CLERK: ALL THE MONDAYS IN MARCH WE CURRENTLY
16 HAVE TRIALS SET.

17 THE COURT: YEAH. OKAY. I'D BE RELUCTANT TO
18 SPECIALLY SET IT BECAUSE I DO HAVE A CIVIL RIGHTS CASE THAT MAY
19 GO ON MARCH 4, SO -- YOU KNOW, WE COULD ADD IT TO THE 13TH.

20 THE CLERK: WE HAVE NOTHING ON THE 22ND.

21 THE COURT: WE DON'T HAVE ANYTHING ON THE 22ND?

22 THE CLERK: THAT'S BETWEEN SMITH AND FERRETTI.

23 MS. DERMODY: THE 13TH WOULD BE BETTER FOR ME, BUT I
24 CAN MAKE THE 22ND.

25 MR. MITTELSTAEDT: I'M TOLD THE 22ND ISN'T GOOD FOR

1 US, EITHER.

2 THE COURT: IS NOT GOOD?

3 MR. MITTELSTAEDT: IS NOT.

4 THE COURT: IS THE 13TH GOOD FOR THE DEFENDANTS?

5 MR. MITTELSTAEDT: I SUSPECT WE CAN GET A
6 REPRESENTATIVE FROM EACH COMPANY HERE ON THE 13TH.

7 THE COURT: OTHERWISE YOU CAN'T DO THE 20TH? IS
8 THAT RIGHT? SOMEBODY CAN'T DO THE 20TH?

9 MS. DERMODY: YES, THAT'S ME, YOUR HONOR. I'M
10 SORRY.

11 THE COURT: ALL RIGHT. LET'S DO IT ON THE 13TH.
12 YEAH, ON THE 13TH. SO THE NEXT CMC IS GOING TO BE MARCH THE
13 13TH OF 2013 AT 2:00 O'CLOCK.

14 LET ME ASK A COUPLE OF QUESTIONS ON THE MOTION TO STRIKE
15 AND I'LL TRY TO WRAP THIS UP. I APOLOGIZE THE HEARING IS
16 TAKING A LONG TIME.

17 DID MR. MURPHY OR ANY OF HIS TEAM RELY ON THE INTERVIEW
18 NOTES WHEN FORMING THE OPINIONS ABOUT WHICH DR. MURPHY WROTE,
19 TESTIFIED, FORMED?

20 MR. HINMAN: YOUR HONOR, FRANK HINMAN.

21 THE ANSWER TO THAT IS NO.

22 THE COURT: NOT AT ALL?

23 MR. HINMAN: CORRECT, YOUR HONOR.

24 THE COURT: ALL RIGHT.

25 MR. HINMAN: MR. MURPHY DIDN'T TAKE ANY NOTES, SO HE

1 DIDN'T HAVE ANY OF HIS OWN TO RELY ON, NOR DID HE RELY ON ANY
2 NOTES THAT ANYBODY ELSE MAY HAVE TAKEN. SO THE ANSWER IS NO.

3 MR. GLACKIN: BUT THE --

4 THE COURT: BUT WHAT ABOUT -- WHO WROTE HIS REPORT?

5 I ASSUME SOME MEMBERS OF HIS TEAM HELPED HIM IN DRAFTING HIS
6 REPORT AND FORMING HIS OPINIONS. THAT'S USUALLY WHAT HAPPENS.
7 DID THAT NOT HAPPEN IN THIS CASE? HE WROTE IT HIMSELF, ALL 70
8 PAGES?

9 MR. HINMAN: NO, YOUR HONOR. IT ABSOLUTELY DID
10 HAPPEN. THERE WAS A DRAFTING PROCESS, AS THERE OFTEN IS.

11 THE COURT: OKAY.

12 MR. HINMAN: BUT THE FINAL REPORT, THE NOTES WERE
13 NOT RELIED UPON IN FORMING THE OPINIONS THAT ARE EXPRESSED IN
14 THE FINAL REPORT.

15 AND SO, YOU KNOW, NOT ONLY -- I MEAN, PUTTING ASIDE THE
16 USUAL --

17 THE COURT: OKAY. I'M SORRY TO INTERRUPT YOU. LET
18 ME ASK, DID THE PEOPLE WHO WORKED ON THE TEAM THAT DRAFTED THE
19 REPORT, DID THEY DRAFT INTERVIEW NOTES?

20 MR. HINMAN: YES.

21 THE COURT: OKAY.

22 MR. HINMAN: THEY DID.

23 THE COURT: ALL RIGHT.

24 MR. HINMAN: BUT THEY WERE NOT -- AS I SAY, THEY
25 WERE NOT USED BY HIM OR ANYBODY ELSE IN FORMING THE OPINIONS

1 THAT ARE CONTAINED IN THE REPORT.

2 AND WE HAVE A STIPULATION IN THIS CASE, YOUR HONOR,
3 THAT'S, I THINK, VERY CLEAR THAT WAS, YOU KNOW -- I MEAN, IT'S
4 NOT UNCOMMON IN THESE ANTITRUST CASES WITH LOTS OF EXPERTS ON
5 BOTH SIDES AND THINGS LIKE THIS THAT WE'RE NOT GOING TO ALLOW
6 DISCOVERY INTO, YOU KNOW, THIS SORT OF PRELIMINARY WORK PRODUCT
7 AND NOTES THAT PEOPLE MAY HAVE TAKEN, ET CETERA.

8 AND SO EVEN PUTTING ASIDE -- AND I'M NOT PUTTING IT ASIDE
9 EXCEPT FOR THE MOVEMENT -- ISSUES OF WORK PRODUCT, THE
10 STIPULATION GOES BEYOND THAT. IT EXPLICITLY SAYS THAT IT
11 SUPERSEDES ANY RULE OF CIVIL PROCEDURE THAT MIGHT APPLY.

12 I DON'T THINK THAT THESE NOTES ARE PRODUCEABLE EVEN UNDER
13 THOSE RULES, BUT THE STIPULATION SAYS IT'S BROADER AND IT IS
14 INTENDED TO AND DOES CARVE OUT ALL OF THIS KIND OF PRELIMINARY
15 WORK PRODUCT.

16 AND IF THERE'S -- THERE REALLY, I THINK, SHOULDN'T BE ANY
17 DISPUTE ABOUT THAT BECAUSE JUST, FOR EXAMPLE, IN THE INSTANCE
18 OF PROFESSOR LEAMER'S DEPOSITION -- AND IT WASN'T THE ONLY
19 INSTANCE -- THAT MR. MITTELSTAEDT REFERRED TO EARLIER,
20 DR. LEAMER WAS INSTRUCTED NOT TO TESTIFY ABOUT, NOT TO DISCLOSE
21 PRELIMINARY WORK PRODUCT THAT HE HAD DONE THAT, INDEED, HE DID
22 RELY ON, THAT HE DID RELY ON IN ORDER TO -- THIS IS THE
23 SENSITIVITY ANALYSIS.

24 HE DID IT, HE RELIED UPON IT TO DECIDE AND CONCLUDE THAT
25 THE AGGREGATED, I'LL CALL IT, REGRESSION MODEL THAT HE OFFERED

1 WAS SUFFICIENT AND THAT THE DISAGGREGATED SENSITIVITY TEST THAT
2 HE RAN DIDN'T TELL HIM ANYTHING TO THE CONTRARY AS MR. GLACKIN,
3 I THINK, SAID.

4 SO, I MEAN, THIS IS JUST -- THIS IS JUST NOT THE SORT OF
5 THING THAT I THINK ANYBODY CONTEMPLATED WOULD BE PRODUCED, AND
6 I THINK THAT BOTH SIDES ARE READING IT IN JUST THAT WAY.

7 MR. GLACKIN: WELL, SO FIRST OF ALL, I STILL DON'T
8 THINK YOU HAVE A STRAIGHT ANSWER TO YOUR QUESTION, WHICH IS,
9 DID ANYBODY WHO HELPED WRITE THIS REPORT LOOK AT THE NOTES WHEN
10 THEY WERE DOING IT?

11 WHAT MR. HINMAN SAID WAS THE NOTES WERE NOT RELIED ON IN
12 FORMING THE OPINIONS, AND I DON'T KNOW WHAT THAT MEANS. I
13 THINK YOU ASKED A STRAIGHTFORWARD QUESTION, AND I DIDN'T HEAR
14 AN ANSWER.

15 SECOND, I THINK TRYING TO BRING UP WHAT WE DID IS
16 COMPLETELY INAPPROPRIATE WITH DR. LEAMER. THEY'VE KNOWN ABOUT
17 WHAT WE DID WITH DR. LEAMER FOR MONTHS. IF THERE WAS ANYTHING
18 WRONG ABOUT WHAT WE DID, THEY'VE HAD EVERY OPPORTUNITY TO RAISE
19 THAT AND ASK FOR THE STUFF AND MOVE ON IT IF THEY DISAGREED
20 WITH US.

21 SO WE'VE ABIDED BY THE STIPULATION. THE STIPULATION SAYS
22 PRELIMINARY DATA ANALYSIS IS NOT PRODUCEABLE. WE DIDN'T
23 PRODUCE PRELIMINARY DATA ANALYSIS.

24 BUT EVEN BEYOND THE STIPULATION, DR. MURPHY HAS AN
25 OBLIGATION, OR I SHOULD SAY THE DEFENDANTS HAVE AN OBLIGATION,

1 TO TELL US THE FACTS ON WHICH HE'S RELYING TO FORM HIS OPINION.

2 THEY CAN DO THAT A LOT OF DIFFERENT WAYS. IF YOU -- IN
3 THE CASE OF THESE INTERVIEWS, ONE WAY THEY COULD DO IT WOULD
4 HAVE BEEN TO RECORD THE INTERVIEWS AND GIVE US THE RECORDINGS.

5 ANOTHER WAY THEY COULD DO IT --

6 THE COURT: THAT'S NOT GOING TO HAPPEN.

7 MR. GLACKIN: WELL, THEY WEREN'T RECORDED, SO IT'S
8 NOT HAPPENING.

9 ANOTHER WAY THEY COULD DO IT IS THEY COULD WRITE SUMMARIES
10 UP AT THE TIME AND GIVE US THE SUMMARIES THAT JUST SAID
11 "MR. SO-AND-SO SAID THIS, THAT, AND THE OTHER THING."

12 ANOTHER WAY THEY COULD DO IT IS THEY COULD PRODUCE
13 DR. MURPHY AND HE COULD TESTIFY FROM HIS MEMORY ABOUT WHAT
14 HAPPENED AT THE INTERVIEWS.

15 BUT THEY HAVE AN AFFIRMATIVE DUTY, UNDER RULE 26, TO TELL
16 US THIS INFORMATION, AND WHEN I ASKED DR. MURPHY ABOUT THIS AT
17 HIS DEPOSITION -- I'M GOING TOO FAST, I APOLOGIZE -- OVER AND
18 OVER AND OVER AGAIN HE SAID HE COULDN'T REMEMBER WHAT HAD BEEN
19 SAID OR WHO HAD TOLD IT TO HIM. HE JUST HAD THIS GENERAL
20 IMPRESSION FROM THESE INTERVIEWS HE'D DONE THAT THESE FOLLOWING
21 THINGS WERE TRUE ABOUT ALL THESE COMPANIES.

22 AND HE SPECIFICALLY TESTIFIED, I BELIEVE, THAT
23 MR. VIJUNGO HAD TOLD HIM THINGS IN HIS INTERVIEW THAT WERE
24 DIFFERENT THAN WHAT MR. VIJUNGO HAD TOLD DR. MURPHY -- OR THAT
25 WERE DIFFERENT THAN WHAT MR. VIJUNGO SAID IN HIS DECLARATION.

1 AND SO THE OBLIGATION, IF THEY WANT TO HAVE AN EXPERT, IS
2 ON THEM TO PRODUCE THE MATERIAL ON WHICH HE'S RELIED, AND THIS
3 IDEA THAT THEY'RE GOING TO TAKE SECRET INTERVIEWS AND HAVE THEM
4 BE A BASIS FOR THE EXPERT'S OPINION IN SUCH A WAY THAT THAT
5 OPINION CANNOT ADEQUATELY BE TESTED, I REALLY HAVE A PROBLEM
6 WITH THAT.

7 THE COURT: SO WHAT IS YOUR BEST AUTHORITY FOR THE
8 PROPOSITION THAT MS. DERMODY MADE THAT IF A PARTY LISTS A
9 WITNESS ON THEIR RULE 26 DISCLOSURES, THAT AUTOMATICALLY MAKES
10 THEM A CUSTODIAN FOR WHOM THEY HAVE TO COLLECT DOCUMENTS AND
11 PRODUCE DOCUMENTS?

12 MR. GLACKIN: WHAT'S OUR BEST AUTHORITY FOR THAT
13 POINT?

14 THE COURT: YEAH.

15 MR. GLACKIN: I'M NOT AWARE OF ANY CASE AUTHORITY
16 FOR THAT POINT OFFHAND, YOUR HONOR.

17 I MEAN, MY AUTHORITY FOR THAT POINT, I GUESS, WOULD BE
18 RULE 26 WHICH SAYS THAT YOU'RE REQUIRED TO IDENTIFY PEOPLE WITH
19 RELEVANT INFORMATION.

20 AND IF YOU'VE GONE SO FAR AS TO IDENTIFY A PERSON WITH
21 RELEVANT INFORMATION, IT SEEMS TO ME, PRACTICALLY SPEAKING,
22 THAT THEIR DOCUMENTS -- TO IMPLY THEIR DOCUMENTS ARE RELEVANT
23 IN THIS DAY AND AGE WHEN VIRTUALLY -- WHEN SO MUCH
24 COMMUNICATION NOW OCCURS ELECTRONICALLY, I WOULD SAY.

25 MR. MITTELSTAEDT: BUT, YOUR HONOR, ON THAT POINT,

1 THEY HAVE KNOWN WHO'S ON THE INITIAL DISCLOSURES AND THEY HAVE
2 KNOWN WHO THE CUSTODIANS ARE. THAT -- WE'VE NEGOTIATED THAT.
3 WE'VE TALKED ABOUT THAT.

4 SO IF THEIR POSITION WAS THAT IF YOU PUT SOMEBODY ON AN
5 INITIAL DISCLOSURE, AUTOMATICALLY THEY'RE A CUSTODIAN, THEY'VE
6 BEEN SITTING IN THE WEEDS ON THAT. THAT'S AN AMBUSH.

7 SO THAT ISN'T -- AND I -- IF THEY'RE SAYING THAT, THAT
8 CAN'T BE RIGHT. THE TIME TO TALK TO US ABOUT THAT WAS LONG AGO
9 WHEN WE PUT PEOPLE ON THE INITIAL DISCLOSURES AND THEY KNEW
10 THEY WEREN'T CUSTODIANS.

11 SO THAT -- BUT -- YOUR HONOR, I KNOW THE HOUR IS LATE, BUT
12 GIVEN THE IMPORTANCE OF THE CLASS MOTION, COULD I BE HEARD FOR
13 TWO MINUTES?

14 THE COURT: JUST TWO MINUTES.

15 MR. MITTELSTAEDT: I WILL TALK FAST.

16 MR. GLACKIN: CAN I GET TWO MINUTES, TOO, AFTER HE'S
17 DONE?

18 MR. MITTELSTAEDT: TO HELP YOUR HONOR WALK THROUGH
19 THE BOOKLET THAT I GAVE YOU, I WOULD SUGGEST LOOKING AT PAGE
20 25, WHICH HAS THE ANSWER TO YOUR HONOR'S QUESTION TO THE OTHER
21 SIDE AS TO WHETHER FIGURES 11 TO 14 ARE CORRELATED OVER TIME.
22 THAT'S A DEPOSITION ADMISSION THAT THEY ARE NOT CORRELATED.

23 PAGE 28 TO 31 SHOWS THAT THE CHARTS ARE NOT
24 REPRESENTATIVE. YOUR HONOR ASKED THE QUESTION, ARE THE CHARTS
25 REPRESENTATIVE? THE DEPOSITIONS AT PAGE 28 THROUGH 31 OF TAB 6

1 GIVE MR. LEAMER'S ANSWER WHERE HE ADMITS THEY ARE NOT
2 REPRESENTATIVE.

3 PAGE 32 SHOWS THAT BECAUSE THOSE CHARTS ARE JUST AVERAGES,
4 THEY WOULD BE CONSISTENT WITH A NON-RIGID STRUCTURE, AS WELL AS
5 A RIGID STRUCTURE, AND THEREFORE, THEY DO NOT PROVE A RIGID
6 STRUCTURE, WHICH IS WHAT LEAMER SETS OUT TO DO IN HIS STEP 2.

7 HIS FIRST STEP IS TO SHOW AN AVERAGE OVERCHARGE. HIS
8 SECOND STEP IS TO TRY AND SHOW THAT THERE WOULD HAVE BEEN A
9 SPREAD TO ALL OR NEARLY ALL OF THE EMPLOYEES.

10 THE COURT: UM-HUM.

11 MR. MITTELSTAEDT: AND HE TOLD US THAT FIGURES 11
12 THROUGH 14 DID NOT DO THE TRICK BECAUSE THEY DID NOT SHOW
13 CORRELATION OVER TIME. HE SAID, "THAT'S WHY I NEED 15 THROUGH
14 17."

15 BUT WHEN WE GOT TO 15 TO 17, HE ADMITTED -- THIS IS AT
16 PAGE 32 IN THE BINDER -- THAT THEY WOULD BE CONSISTENT WITH A
17 NON-RIGID SYSTEM, MEANING THAT THEY DON'T SHOW RIGIDITY.

18 PAGE 28 IN THE BINDER, TAB 6, IS A DOCUMENT THEY OBJECT
19 TO, BUT WHAT IT SHOWS IS IF YOU TAKE THE INTEL JOB THAT THEY
20 CHERRY PICKED, FINANCIAL ANALYST 3 --

21 MR. GLACKIN: I'M SORRY. WHICH PAGE ARE YOU ON?

22 THE COURT: PAGE 28 OF TAB 6.

23 MR. GLACKIN: OKAY.

24 MR. MITTELSTAEDT: I'M SORRY, 37.

25 THE COURT: OKAY.

1 MR. MITTELSTAEDT: THIS IS A CHART OF THE
2 COMPENSATION GROWTH FOR NINE INTEL EMPLOYEES WHO HOLD THE SAME
3 SMALL SLIVER OF A JOB, FINANCIAL ANALYST 3. THEY ARE THE SAME
4 GENDER, THEY'RE THE SAME AGE, AND THEY HAVE THE SAME WORK
5 EXPERIENCE.

6 MR. GLACKIN: I JUST WANT TO -- I APOLOGIZE FOR
7 INTERRUPTING, BUT I WANT TO POINT OUT THAT THIS IS YET ANOTHER
8 REHASHING OF THE SUPPLEMENTAL DATA THAT THE DEFENDANTS HAVE
9 MOVED TO HAVE, WE SAY IMPROPERLY, CONSIDERED BY THE COURT, AND
10 I COMPLETELY -- I -- WE HAVE NOT HAD THE OPPORTUNITY TO
11 VENTILATE IT WITH OUR EXPERTS.

12 I HAVE NO IDEA IF IT'S ACCURATE. I SAW THIS FOR THE FIRST
13 TIME LAST NIGHT AT ABOUT 7:00 OR 8:00 O'CLOCK. SO IT'S JUST --

14 MR. MITTELSTAEDT: YOUR HONOR, LET ME FINISH IF I
15 COULD?

16 MR. GLACKIN: I'M SORRY.

17 MR. MITTELSTAEDT: YOUR HONOR, TAB -- OR PAGE 33 IS
18 THE LETTER THEY SENT TO THE COURT CORRECTING A STATEMENT THEY
19 HAD MADE IN THEIR BRIEF AND THAT DR. LEAMER HAD SAID IN HIS
20 BRIEF.

21 THEIR POINT WAS THE ORIGINAL SAID THAT THERE WERE ONLY
22 SEVEN INTEL GRADE 3 EMPLOYEES WHO HELD THAT TITLE, SAME OTHER
23 CHARACTERISTICS, AND THAT THE AVERAGE -- OR THAT THE DIFFERENCE
24 BETWEEN THE HIGHEST AND THE LOWEST PAID WAS ONLY \$300.

25 AND THEY CITED THAT AS AN EXAMPLE OF SOMETHING SHOWING

1 THAT THERE IS NO VARIATION IN PAY AND, THEREFORE, A RAISE FOR
2 ONE WOULD BE A RAISE FOR EVERYBODY BECAUSE THEY WOULD ALL GO UP
3 TOGETHER. THEY DID NOT SUBMIT THE DATA.

4 BUT THEY LOOKED AT THE DATA AFTER SUBMITTING THEIR REPLY
5 AND WHAT THEY REALIZED WAS, ACTUALLY, THERE ARE 28 PEOPLE THAT
6 SHARE THOSE VERY NARROW CHARACTERISTICS, AND THE RANGE OF
7 SALARY WAS NOT 300, IT WAS 5300.

8 WHAT WE DID WITH DR. MURPHY WAS TO ACTUALLY SUBMIT THE
9 DATA, AND THEN WE CHARTED THE DATA, AND WHAT THE DATA SHOWS
10 IS -- THE FIRST CHART, 36, SHOWS ALL 28 OF THEM, AND YOU'LL SEE
11 THE LINES CROSSING.

12 AND THE IMPORTANT THING TO REMEMBER IN REVIEWING THESE
13 CHARTS IS WHEN THE LINES CROSS, THAT MEANS PEOPLE ARE NOT
14 MOVING THE SAME.

15 AND THEN THEY SAID, "WELL, 28 IS TOO MANY BECAUSE SOME OF
16 THOSE PEOPLE WERE PROMOTED TO DIFFERENT JOBS," AND WE SAID,
17 "EXACTLY. PEOPLE ARE TREATED DIFFERENTLY. THAT'S OUR POINT."

18 BUT WE SAID WE'LL JUST TAKE THE NINE PEOPLE WHO HELD THE
19 SAME JOB, STILL THEY WERE THE SAME GENDER, STILL THE SAME AGE,
20 STILL THE SAME TENURE, FOR THREE YEARS AND LOOK AT THAT VERY
21 SMALL SLICE, AND WHAT YOU SEE IS LINES CROSSING. PEOPLE --
22 SOME PEOPLE GO UP, SOME PEOPLE GO DOWN.

23 AND, YOUR HONOR, WE'RE TALKING ABOUT WITHIN THE SAME VERY,
24 VERY SMALL SLICE OF JOB CONTROLLED FOR THE OTHER FACTORS.

25 THAT SINGLE DOCUMENT, YOUR HONOR, SHOWS THAT THEIR IDEA OF

1 A RIGID PAY STRUCTURE, WHATEVER IS IN THE DOCUMENTS, IS NOT
2 TRUE.

3 ON -- OKAY. SO THAT'S WALKING YOUR HONOR QUICKLY THROUGH
4 THOSE.

5 ON THE DOCUMENTS, I WOULD ASK YOUR HONOR TO TAKE A LOOK AT
6 SHAVER EXHIBIT 59 AND HARVEY EXHIBIT 30. THOSE ARE TWO OF THE
7 DOCUMENTS YOUR HONOR ASKED ME ABOUT WHEN I SAID THAT I THINK
8 THEY SHOW THE INDIVIDUALIZED NATURE OF THE IMPACT.

9 THEY ALSO, I THINK, READ CLOSELY SHOW THE OPPOSITE OF A
10 RIGID STRUCTURE. THE GOOGLE DOCUMENT, WHEN YOU READ THE FIRST
11 DOCUMENT, THE OCTOBER 7TH ONE, IT SHOWS THAT GOOGLE WAS MAKING
12 COUNTEROFFERS TO PEOPLE AND THAT CAUSED WHAT THEY CALL
13 DISCONTINUITY AND UNFAIR BUMPS.

14 THE MERITS OF THESE AGREEMENTS ASIDE, YOUR HONOR, WE'RE
15 NOT HERE TO TALK ABOUT THOSE, WHAT WE'RE HERE TO TALK ABOUT IS,
16 WHO WAS IMPACTED?

17 AND WHAT THIS DOCUMENT SHOWS IS AS OF OCTOBER 2010,
18 GOOGLE'S POLICY WAS TO MAKE COUNTEROFFERS TO SOME PEOPLE, BUT
19 NOT TO ADJUST EVERYBODY ELSE.

20 THAT IS THE OPPOSITE OF THEIR RIGID PAY STRUCTURE. WHAT
21 IT MEANS IS THAT TO FIGURE OUT IF SOMEBODY IS IMPACTED, YOU
22 NEED TO GO PERSON BY PERSON, JUST AS IN REED, JUST AS IN
23 JOHNSON.

24 THE OTHER POINT -- YOU ASKED HIM ABOUT LCD AND
25 JUDGE ILLSTON'S OPINION. I ASK YOUR HONOR TO KEEP IN MIND, IN

1 REVIEWING THIS, THAT THE DIFFERENCE BETWEEN LCD AND THE JOHNSON
2 AND REED LINE OF CASES -- WHICH LCD IS A TRADITIONAL ANTITRUST
3 CASE. IT'S PRICE FIXING OF A COMMODITY.

4 AND IF THE DEFENDANTS FIXED THE PRICE OF A COMMODITY,
5 CHANCES ARE EVERYBODY -- AND IF THEY SELL THE COMMODITY FOR ONE
6 PRICE, YOU SHOW IMPACT ON ONE, YOU'VE GOT IMPACT ON EVERYBODY,
7 AND THAT'S WHY COURTS OFTEN, IN TRADITIONAL PRICE FIXING CASES
8 FOR COMMODITIES, FUNGIBLE COMMODITIES, CERTIFY A CLASS AND FIND
9 THAT IMPACT IS NOT HIGHLY INDIVIDUALIZED.

10 WE'RE NOT DEALING WITH COMMODITIES. WE'RE DEALING WITH
11 HUMAN BEINGS, AND HUMAN BEINGS' WAGES ARE SET INDIVIDUALLY IN
12 THESE COMPANIES.

13 AND THAT'S WHY, IN REED, THE COURT SAID THE NURSES'
14 SALARIES ARE SET INDIVIDUALLY, THEY CAN'T SHOW IMPACT ACROSS
15 THE BOARD, YOU HAVE TO GO NURSE BY NURSE.

16 OUR CASE OBVIOUSLY IS A LOT BIGGER, A LOT MORE COMPLICATED
17 THAN JUST ONE JOB CATEGORY, NURSES. IT INVOLVES SEVEN
18 DEFENDANTS, IT INVOLVES 7,000 DIFFERENT JOB TITLES , AND IT
19 INVOLVES INDIVIDUALIZED PAY DECISIONS MADE BY THOUSANDS OF
20 MANAGERS.

21 AND SO IF THE CLASSES WERE DENIED IN REED AND IN JOHNSON,
22 THEY SHOULD BE DENIED EVEN MORE SO HERE. THIS IS NOT THE LCD,
23 YOU KNOW, SETTING OF PRICES OF TV SCREENS WHERE WHEN YOU
24 OVERPRICE ONE, YOU OVERPRICE ALL OF THEM.

25 THE OTHER POINT IS ON THIS SMALLER CLASS, THAT CLASS IS

1 NOT DATA DRIVEN. WHEN THE PLAINTIFFS TOLD YOUR HONOR THEY WERE
2 GOING TO LOOK AT THE COMPENSATION DATA, NOT COLD CALLING DATA,
3 THEY TOLD YOUR HONOR THEY WERE GOING TO LOOK AT COMPENSATION
4 DATA AND FIGURE OUT WHERE THE SPREAD WAS.

5 DR. LEAMER DID NOT COME UP WITH THE TECHNICAL CLASS. THE
6 LAWYERS CAME UP WITH THAT. DR. LEAMER TESTIFIED THAT HE
7 RECEIVED THAT DEFINITION FROM THE LAWYERS, SO THAT'S NOT DATA
8 DRIVEN.

9 TWO LAST POINTS. YOUR HONOR HAS FOCUSED, UNDERSTANDABLY,
10 ON THE SCOPE OF THE AGREEMENTS, THE UNLAWFULNESS OF THE
11 AGREEMENTS, SOME OF THE E-MAILS.

12 NONE OF THAT GOES TO THE QUESTION THAT I THINK IS CENTRAL
13 HERE, AND THAT IS, HOW DO THEY SHOW IMPACT? HOW DO THEY SHOW
14 THAT SOMEBODY'S WAGES WERE AFFECTED BY NOT GETTING A COLD CALL?

15 AND AS WE'VE SET FORTH IN THE PAPERS, THE ONLY WAY TO DO
16 THAT IS GO PERSON BY PERSON. YOU CAN'T ASSUME THAT EVERYBODY
17 WOULD HAVE GOT A COLD CALL.

18 YOU CAN'T ASSUME THAT EVERYBODY WHO GOT A COLD CALL -- WHO
19 WOULD HAVE GOT A COLD CALL WOULD HAVE GOT A RAISE.

20 AND YOU CAN'T ASSUME THAT IF SOMEBODY GOT A RAISE FROM A
21 COLD CALL, THAT WOULD PROPAGATE OR CASCADE OR RIPPLE, WHATEVER
22 VERB THEY WANT TO USE, TO EVERYBODY ELSE.

23 I MEAN, YOU THINK ABOUT THE ABSURDITY OF THAT. WHY WOULD
24 A COMPANY GIVE A RAISE TO SOMEBODY IN A NEGOTIATION IF IT KNEW
25 THAT IT HAD TO TURN AROUND AND GIVE A RAISE TO EVERYBODY? I

1 MEAN, THAT WOULDN'T MAKE ANY SENSE.

2 AND THAT'S WHY, WHEN YOU LOOK AT THE DATA, WHEN YOU LOOK
3 AT THE DATA IN OUR FIRST FOUR OR FIVE TABS, IT SHOWS VARIATION
4 AMONG PEOPLE WHO ARE IDENTICAL IN EVERY CHARACTERISTIC.

5 BUT THERE'S VARIATION BECAUSE MANAGERS ARE MAKING THE
6 DISCRETIONARY JUDGMENT, AND IT SHOWS VARIATION FROM JOB TO JOB
7 IN A SNAPSHOT AND ACROSS TIME. JOBS MOVE DIFFERENTLY, AND
8 THAT'S WHY WHEN YOU LOOK AT THOSE CHARTS, IT SHOWS THE
9 DISTRIBUTION OF CHANGES. SOME JOBS, THE TOTAL COMPENSATION OR
10 AVERAGE COMPENSATION GOES UP, AND OTHER JOBS IT GOES DOWN.

11 THEY'RE NOT CORRELATED OVER TIME, WHICH IS WHAT LEAMER HAS
12 ADMITTED AND WHICH HE'S ADMITTED HIS CHARTS DON'T SHOW.

13 AND THAT'S WHAT HE'S -- HE UNDERTAKES, IN HIS SECOND STEP,
14 TO SHOW THAT THIS AVERAGE OVERCHARGE WOULD -- OR UNDERPAYMENT
15 WOULD HAVE SPREAD TO EVERYBODY AND HE SAYS HE'S GOING TO DO
16 THAT BY SHOWING HOW CLOSELY CORRELATED ALL THESE JOBS ARE.
17 THAT'S WHEN HE SAYS IT'S A RIGID PAY STRUCTURE.

18 UNDER HIS OWN METHOD, HE'S GOT TO SHOW THAT THE PAY
19 STRUCTURE IS SO RIGID THAT A RAISE FOR ONE OR A RAISE FOR
20 ALL -- EXCUSE ME, A RAISE FOR ONE OR FOR SOME IN A DEPARTMENT
21 IS GOING TO PROPAGATE TO BE A RAISE FOR EVERYBODY IN THAT
22 DEPARTMENT, AND THEN SOMEHOW EVERY OTHER DEPARTMENT, EVERY
23 OTHER JOB TITLE, NO MATTER HOW DISPARATE, AND THEN ONCE IT DOES
24 THAT, IT'S GOING TO DO THE SAME THING AT ALL THE OTHER
25 COMPANIES.

1 AND IF YOU THINK -- IF YOU THINK ABOUT IT, WHATEVER THE
2 SCOPE OF THESE AGREEMENTS AFFECTING 1 PERCENT OF THE MARKET
3 THAT THESE COMPANIES OPERATED IN IN TERMS OF LABOR POOLS,
4 THERE'S NO WAY TO THINK THAT THAT WAS GOING TO HAVE A BROAD
5 IMPACT LIKE THEY'RE DESCRIBING, WHICH I THINK IS WHY, FROM THE
6 VERY START, YOUR HONOR SAID, "LOOK, IT CAN'T BE EVERYBODY.
7 LOOK AT THE COMPENSATION DATA AND SEE IF YOU CAN SEE WHERE THE
8 IMPACT WAS."

9 THAT'S WHAT THEY WERE SUPPOSED TO DO AND THAT'S WHAT THEY
10 DIDN'T DO.

11 THEY INSTEAD COME UP WITH LEAMER WITH THIS TWO-STEP
12 PROCESS. HIS FIRST STEP TO SHOW THE AVERAGE UNDERPAYMENT, AS I
13 WALKED UNDER THROUGH AND AS THESE CHARTS SHOW, THAT DOESN'T
14 SHOW AN AVERAGE OF ANYTHING. IT SHOWS EVERYBODY TAKEN
15 TOGETHER, EVEN IF YOU PUT ASIDE ALL THE OTHER TECHNICAL
16 PROBLEMS WITH THE REGRESSION.

17 BUT MORE THAN THAT, WHEN YOU DISAGGREGATE IT, AS HE DID
18 BUT AS HE WOULDN'T GIVE US, BUT HE SAID, "OKAY, PRESS A BUTTON
19 AND YOU CAN DO IT."

20 WHEN WE DID IT, IT SHOWS THAT THREE OR FOUR OF THE
21 DEFENDANTS GO THE OPPOSITE DIRECTION.

22 NOW, I'M NOT CITING THAT TO SAY THAT THAT PROVES THAT
23 THESE AGREEMENTS RESULTED IN OVERCOMPENSATION. WHAT WE CITE
24 THAT FOR IS TO SHOW THAT WHEN YOU DO A SENSITIVITY TEST AND YOU
25 GET SOME PEOPLE GOING ONE WAY, SOME COMPANIES GOING THE OTHER

1 WAY, THAT TELLS YOU SOMETHING IS WRONG WITH THE MODEL.

2 BUT EVEN IF HE HAD A PERFECT SYSTEM --

3 THE COURT: CAN YOU WRAP UP?

4 MR. MITTELSTAEDT: OKAY.

5 THE COURT: JUST 15 SECONDS, PLEASE.

6 MR. MITTELSTAEDT: TWO LAST POINTS. ONE IS IN THEIR
7 REPLY BRIEF, THEY SAY MURPHY CONCEDED THIS, MURPHY CONCEDED
8 THAT.

9 WE'VE SUBMITTED SUPPLEMENTAL EXCERPTS FROM MURPHY'S
10 TESTIMONY AND, IF ANY OF THAT MATTERS, WHEN YOU ACTUALLY READ
11 MURPHY'S TESTIMONY, HE DIDN'T COME CLOSE TO MAKING THE
12 CONCESSIONS THAT THEY SAY HE DID.

13 AND FINALLY, YOUR HONOR, YOU KNOW, THIS MATTER IS
14 COMPLICATED. WE HAD REQUESTED AN EVIDENTIARY HEARING AT THE
15 START AND YOUR HONOR DECLINED THAT.

16 I WOULD ASK YOUR HONOR TO JUST CONSIDER, AS YOU REVIEW
17 WHAT THEY'VE DONE AND THE ANSWERS YOU'VE RECEIVED TODAY ABOUT
18 WHAT THEY DID, AND THE CONSTANT REFRAIN WAS, "WELL, YOU KNOW,
19 WE REALLY NEED DR. LEAMER TO EXPLAIN THAT," GIVEN THAT YOUR
20 HONOR WILL BE MAKING A RIGOROUS ANALYSIS OF WHAT THE EXPERTS
21 DID, AND GIVEN THAT OUR POSITION IS THIS ISN'T A BATTLE OF
22 EXPERTS, THIS IS A CASE WHERE DR. LEAMER HAS ADMITTED THAT
23 HIS -- THAT WHAT HE TRIED TO DO WITH HIS TWO STEPS DON'T WORK
24 BECAUSE THEY DON'T STAND UP TO EVEN THE TEST THAT HE PROVIDED,
25 AND BY THAT WHAT I MEAN IS HE SAID IN HIS STEP TWO HE WAS GOING

1 TO SHOW THAT ANY OVERCHARGE WAS CORRELATED OVER TIME, AND HE'S
2 ADMITTED AT THE PAGES I CITED TO YOUR HONOR AT THE START HERE
3 THAT THEY DON'T DO THAT. THEY DON'T DO THAT AT ALL.

4 AND THEN INTEL 28 AND THE APPLE 4, WHICH IS THE SAME KIND
5 OF THING, SHOWS THAT EVEN WITHIN THE SAME JOB TITLE, THE
6 EMPLOYEES' COMPENSATION GOES DIFFERENT DIRECTIONS, THE OPPOSITE
7 OF THE RIGID SYSTEM THAT THEY SAY THEY NEED TO -- THAT IS THE
8 HEART OF THEIR METHOD OF PROVING COMMON IMPACT.

9 SO WHEN YOU GET DONE WITH ALL OF IT, WHERE YOU END UP IS
10 THE ONLY WAY TO DETERMINE WHO WAS IMPACTED BY THESE
11 AGREEMENTS -- AND I ADMIT AT THE START, WE ARE NOT SAYING THAT
12 NOBODY WAS IMPACTED. YOU LOOK AT SOME OF THESE DOCUMENTS THAT
13 TALK ABOUT "WE DON'T WANT SO-AND-SO TO BE COLD CALLED BECAUSE,
14 YOU KNOW, HE MIGHT LEAVE AND MIGHT GET SOME MORE MONEY." THAT
15 PERSON MAY HAVE A CLAIM.

16 BUT IF HE HAS A CLAIM, THAT DOESN'T MEAN THAT ANYBODY ELSE
17 WHO WORKED WITH HIM, ANYBODY ELSE IN ANOTHER DEPARTMENT, THE
18 SOU CHEF, ANYBODY ELSE IN ANY OTHER DEPARTMENT HAS A CLAIM, AND
19 IT DOESN'T MEAN THAT ALL THE OTHER COMPANIES WOULD HAVE GIVEN
20 RAISES TO THEIR PEOPLE IF THIS ONE PERSON HAD GOTTEN A RAISE.

21 THAT'S THEIR THEORY, THE RIPPLE EFFECT.

22 THE DATA SHOWS THAT THEY'RE -- EVEN IN THE BEFORE TIME
23 PERIOD --

24 THE COURT: ALL RIGHT. I REALLY NEED YOU TO WRAP
25 UP, OKAY.

1 MR. MITTELSTAEDT: LAST WORD. WHEN YOU LOOK AT THE
2 DATA FROM THE --

3 THE COURT: YOU'RE KILLING ME HERE.

4 (LAUGHTER.)

5 MR. MITTELSTAEDT: WHEN YOU LOOK AT THE DATA FROM
6 THE BEFORE PERIOD, IT SHOWS THAT THESE COMPANIES DID NOT HAVE
7 THE RIGID PAY STRUCTURE THAT IS, UNDER THEIR OWN METHOD, THE
8 CENTERPIECE, THE ESSENTIAL ELEMENT OF THEIR CLAIM, LEAVING US
9 WITH INDIVIDUALIZED INQUIRIES TO DETERMINE WHO WAS IMPACTED.

10 THE COURT: OKAY.

11 MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.

12 THE COURT: THANK YOU.

13 MR. MITTELSTAEDT: I APPRECIATE THE TIME.

14 THE COURT: I'M GOING TO KEEP YOU TO TWO MINUTES
15 BECAUSE YOU HAD A LOT OF TIME FOR THIS HEARING AND DEFENDANTS
16 DIDN'T HAVE THAT TIME.

17 MR. GLACKIN: I UNDERSTAND, YOUR HONOR. I'M GOING
18 TO NOT RESPOND TO ALL OF THAT. I MEAN, I DON'T AGREE WITH IT,
19 BUT I'LL LEAVE IT TO THE RECORD. I THINK ALL THOSE POINTS HAVE
20 BEEN ADDRESSED IN THE RECORD.

21 I WANTED TO MAKE -- SO I WANTED TO DRAW THE COURT'S
22 ATTENTION TO TWO CASES.

23 MR. MITTELSTAEDT: BRANDON.

24 I FORGOT TO SAY THE LAST THING I WAS LEADING UP TO, WHICH
25 IS NOW THAT YOUR HONOR HAS LOOKED AT ALL OF THIS AND IS

1 STARTING TO STUDY IT, OR WHATEVER STAGE YOU'RE IN, I WOULD ASK
2 YOUR HONOR TO RECONSIDER WHETHER AN EVIDENTIARY HEARING WOULD
3 MAKE SENSE GIVEN WHAT THEY'VE SAID ABOUT -- DID I SAY THAT?

4 THE CLERK: YOU DID.

5 MR. MITTELSTAEDT: I DID SAY THAT?

6 MR. GLACKIN: YOU SAID IT ALREADY.

7 THE COURT: OKAY. I MEAN, IF THEY CAN'T PROVE IT,
8 THEY CAN'T -- IF THEY CAN'T PRESENT IT TODAY, I'M NOT GOING TO
9 GIVE DR. LEAMER ANOTHER OPPORTUNITY TO TRY TO CORRECT IT.

10 MR. MITTELSTAEDT: OKAY.

11 MR. GLACKIN: SO, YOUR HONOR, MR. MITTELSTAEDT SAID
12 THAT THE MOST IMPORTANT CASE YOU NEED TO UNDERSTAND IS THE REED
13 CASE, WHICH IS FROM THE NORTHERN DISTRICT OF ILLINOIS.

14 THEY'VE NEVER ADDRESSED KOHEN AND MESSNER, WHICH ARE THE
15 AUTHORITIES WE CITED FOR THE PROPOSITION THAT YOU DO NOT NEED
16 TO SHOW HARM TO EVERY INDIVIDUAL CLASS MEMBER.

17 THOSE ARE CASES FROM THE SEVENTH CIRCUIT COURT OF APPEALS
18 WHICH, BY THE WAY, OVERSEES THE NORTHERN DISTRICT OF ILLINOIS,
19 SO I THINK THAT THOSE ARE FAR BETTER AUTHORITY ON THIS POINT.

20 AND I WANTED TO CALL THE COURT'S ATTENTION TO THE FACT
21 THAT THERE -- I JUST FIGURED OUT YESTERDAY, AND I TOLD THEM I
22 WOULD RAISE THIS YESTERDAY, I FOUND TWO MORE CASES THAT SHOW
23 THAT THIS RULE OF KOHEN THAT YOU DO NOT NEED TO SHOW INJURY ON
24 AN INDIVIDUAL BY INDIVIDUAL BASIS TO EVERY SINGLE CLASS MEMBER
25 HAS BEEN ADOPTED IN TWO MORE CIRCUITS, THE TENTH CIRCUIT AND

1 THE FIFTH CIRCUIT, AND I'M JUST GOING TO READ THE CITATIONS
2 INTO THE RECORD.

3 THE FIRST CASE IS D.G. VERSUS DEVAUGHN, CITE 594 F.3D
4 1188, AND THAT'S IN THE TENTH CIRCUIT; AND THE SECOND
5 CIRCUIT -- EXCUSE ME -- THE SECOND CASE IS MIMS VERSUS STEWART
6 TITLE GUARANTEE COMPANY, THE CITATION IS 590 F.3D 298, AND
7 THAT'S IN THE FIFTH CIRCUIT.

8 AND IN BOTH THOSE CASES, BOTH OF THOSE COURTS SAY YOU DO
9 NOT NEED TO SHOW INDIVIDUAL PROOF TO EVERY SINGLE MEMBER OF THE
10 CLASS, AND THEY CITE AND QUOTE KOHEN FOR THAT PROPOSITION.

11 I WANTED TO ADDRESS -- I WANTED TO SAY ALSO THAT WE HAD A
12 LOT OF QUESTIONS AND A LOT OF ARGUMENT TODAY ABOUT REGRESSION
13 ANALYSIS, AND I WOULD REALLY ENCOURAGE THE COURT TO READ
14 CLOSELY THE SUPREME COURT'S BAZEMORE DECISION. WE CITE THAT
15 FOR THE GENERAL PROPOSITION THAT IT'S CITED FOR IN EVERY CASE,
16 WHICH IS THAT IF YOU COVER THE MAJOR FACTORS, A REGRESSION
17 ANALYSIS IS NOT, FOR OTHER REASONS, INADEQUATE.

18 THERE'S TWO OTHER THINGS WE DIDN'T HAVE SPACE TO MENTION
19 IN THE BRIEFS, WHICH IS, ONE, BAZEMORE IS A WAGE SUPPRESSION
20 CASE, AND THE PLAINTIFFS IN BAZEMORE WERE SEEKING TO DO EXACTLY
21 THE SAME THING THAT WE ARE SEEKING TO DO HERE, AND THE COURT OF
22 APPEAL REJECTED THEIR REGRESSION ANALYSIS BECAUSE THEY DIDN'T
23 HAVE ALL OF THE VARIABLES THAT THE COURT OF APPEAL THOUGHT WAS
24 RELEVANT AND THE SUPREME COURT REVERSED.

25 THE COURT OF APPEAL ALSO REJECTED THEIR ANALYSIS BECAUSE

1 THEY FAILED TO DISAGGREGATE THE DATA ON A COUNTY BY COUNTY
2 BASIS. THE COURT OF APPEAL SAYS THAT THIS -- THAT THESE WAGES
3 SHOULD HAVE BEEN EXAMINED COUNTY BY COUNTY BY COUNTY IN ORDER
4 TO EXCLUDE THE POSSIBILITY THAT COUNTY BY COUNTY DIFFERENCES
5 WERE DRIVING THE RESULT OR BEING OBSCURED BY THE RESULT, AND
6 THE SUPREME COURT REJECTED THAT AS WELL AND REVERSED.

7 THE SUPREME COURT -- WHETHER OR NOT THIS WAS ADMISSIBLE
8 EVIDENCE WASN'T EVEN ON THE TABLE. THE SUPREME COURT REVERSED
9 THE BENCH VERDICT THAT THE PLAINTIFFS HAD NOT MET THEIR
10 STANDARD OF BURDEN OF PROVING BY A PREPONDERANCE OF THE
11 EVIDENCE BECAUSE IT FOUND THAT THE SUPREME COURT -- EXCUSE
12 ME -- THE COURT OF APPEAL AND THE DISTRICT COURT HAD APPLIED
13 THE WRONG LEGAL STANDARD IN REJECTING THIS EVIDENCE AS
14 PROBATIVE.

15 SO I THINK THAT A CLOSE READING OF THE BAZEMORE CASE WILL
16 REALLY HELP UNDERSTAND -- HELP ILLUSTRATE JUST HOW COMMON AND
17 ACCEPTED REGRESSION ANALYSIS IS, AND THAT ALL OF THESE POINTS
18 ABOUT SENSITIVITY AND DISAGGREGATION AND WHETHER OR NOT WE USE
19 THE RIGHT VARIABLES ARE -- THEY'RE AT GREAT RISK FOR
20 CROSS-EXAMINATION AND I'VE SEEN IT DONE. I'VE SEEN IT DONE
21 AGAINST DR. LEAMER IN TRIAL.

22 BUT IT'S NOT AN ISSUE THAT GOES TO THE ADMISSIBILITY OF
23 THE EVIDENCE.

24 AND ON THAT LAST POINT, THE ONE THING THAT I JUST HAVE TO
25 SAY IS THAT WHEN -- IT'S REALLY EASY FOR MR. MITTELSTAEDT TO

1 STAND HERE AND SAY THAT LCD WAS A REAL EASY STANDARD PRICE
2 FIXING CASE AND IMPACT WAS PRACTICALLY PRESUMED.

3 NOTHING COULD BE FURTHER FROM THE TRUTH, FRANKLY. THE
4 DEFENDANTS CONTESTED IMPACT AT EVERY STEP OF THE CASE. THE
5 DEFENDANTS' ARGUMENT WAS ACTUALLY VERY SIMILAR TO THE ARGUMENT
6 IN THIS CASE. THEY SAID, "WE HAVE THOUSANDS OF DIFFERENT
7 PRODUCT MODELS EVERY YEAR. THESE PRODUCTS HAVE TONS OF
8 DIFFERENT FEATURES. WE SET IT -- WE NEGOTIATE A DIFFERENT
9 INDIVIDUAL PRICE FOR EVERY SINGLE ONE OF THESE PRODUCT MODELS
10 WITH OUR CUSTOMERS, SO HOW CAN YOU POSSIBLY SHOW THAT EVERY
11 CUSTOMER WAS INJURED UNLESS YOU LOOK AT EVERY INDIVIDUAL
12 TRANSACTION BETWEEN THAT CUSTOMER AND THE DEFENDANTS?"

13 AND THE LAW IS CLEAR THAT THAT IS NOT OUR BURDEN AND,
14 FRANKLY, THE TESTIMONY IN THIS CASE IS CLEAR THAT THAT
15 REGRESSION ANALYSIS IS NOT CAPABLE OF THAT KIND OF AN INQUIRY.

16 SO WHAT DID WE DO IN LCD? WE DID EXACTLY THE SAME THING
17 THAT'S BEEN PROPOSED HERE. WE DID A CORRELATION ANALYSIS TO
18 SHOW A STRUCTURE IN THE MARKET, AND WE OFFERED A REGRESSION
19 ANALYSIS TO SHOW BOTH IMPACT AND DAMAGES, AND THAT WAS
20 TESTIFIED TO AT TRIAL OVER A DAUBERT MOTION.

21 THAT REGRESSION MODEL PRODUCED AN AVERAGE EFFECT
22 COEFFICIENT FOR THE CONSPIRACY, JUST LIKE IN THIS CASE, THE
23 REASON BEING THAT WE COULD NOT POSSIBLY -- DR. LEAMER COULD NOT
24 POSSIBLY CONTROL FOR EVERY SINGLE DIFFERENT COMBINATION OF
25 PRODUCT FEATURES IN THIS, YOU KNOW, IN THIS MASSIVE MARKET.

1 SO INSTEAD THERE WAS A SINGLE -- THERE WAS A SINGLE
2 CONSPIRACY EFFECT VARIABLE FOR THE ENTIRE CONSPIRACY, JUST LIKE
3 HERE; AND THEN DR. LEAMER, JUST LIKE HERE, HE TOOK STEPS TO TRY
4 TO ALLOW THAT VARIABLE TO BE HETEROGENEOUS ACROSS DIFFERENT
5 SCREEN SIZES. THERE WAS DATA ENOUGH TO DO THAT.

6 SO WE ALLOWED -- JUST LIKE HERE WHERE HE'S ALLOWED TO VARY
7 DEFENDANT BY DEFENDANT BASED ON QUALITIES THAT ARE UNIQUE TO
8 EACH DEFENDANT, IN LCD, HE ALLOWED THE IMPACT OF THAT VARIABLE
9 TO DIFFER SCREEN SIZE BY SCREEN SIZE BASED ON DIFFERENT
10 FEATURES OF THOSE MARKETS.

11 IT'S EXACTLY THE SAME EVIDENCE. AND THE DEFENDANTS MADE
12 THE SAME ARGUMENTS IN THAT CASE, THAT HIS REGRESSION ANALYSIS
13 WAS SENSITIVE. IF YOU MOVE THE END DATE OF THE CONSPIRACY --

14 THE COURT: I NEED YOU TO WRAP UP. THIS IS CRUEL
15 AND UNUSUAL PUNISHMENT TO MS. SHORTRIDGE WHO'S BEEN
16 TRANSCRIBING FOR NEARLY FOUR HOURS, OKAY? SO YOU NEED TO
17 CONCLUDE HERE.

18 FIVE MINUTES. FIVE SECONDS.

19 MR. GLACKIN: I DON'T EVEN NEED FIVE SECONDS. I
20 DON'T HAVE ANY MORE TO ADD.

21 THANK YOU VERY MUCH.

22 THE COURT: OKAY. I'M GOING TO GIVE MR. HINMAN --
23 RIGHT? -- THE LAST WORD.

24 MR. HINMAN: YES. THANK YOU, YOUR HONOR. AND I
25 DON'T WANT TO ADD TO THE MISERY. JUST VERY BRIEFLY.

1 WITH RESPECT TO THESE NOTES, TO THE EXTENT THAT THIS IS
2 STILL AN ISSUE AT ALL IN YOUR HONOR'S MIND, I THINK WE HEARD
3 SOME THINGS THAT, FRANKLY, AREN'T IN THE RECORD AND I DON'T
4 THINK ARE QUITE RIGHT.

5 SO WHAT I WOULD SAY IS THE ARGUMENT BOILS DOWN TO
6 DR. MURPHY HAS GOT TO DISCLOSE WHAT HE RELIED ON.

7 HE WAS ASKED IN HIS DEPOSITION WHAT HE RELIED ON, AND HE
8 SAID, "SPECIFICALLY I'M RELYING ON THOSE DECLARATIONS," SO THE
9 DECLARATIONS THAT ARE BEFORE THE COURT AND IN THE RECORD,
10 "THAT'S CONSISTENT WITH OTHER THINGS THAT, IN THE INTERVIEWS,
11 THAT PEOPLE SAID." THAT'S AT PAGE 133 TO -34.

12 AND THEN AT PAGE 122, HE SAID, "IN GENERAL, IT WAS RELYING
13 ON THE GENERAL BACKGROUND. AS I'VE SAID NUMEROUS TIMES, AND I
14 THINK IN THAT REGARD, I THINK THE INFORMATION FROM THE
15 INTERVIEWS AND THE INFORMATION FROM THE DECLARATIONS. IT'S
16 JUST AT THE END OF THE DAY, GIVEN THAT WE HAD THE DECLARATIONS,
17 IT MADE MORE SENSE TO RELY UPON THEM."

18 SO HE'S DISCLOSED THE DECLARATIONS, HE'S DISCLOSED THE
19 PEOPLE WHO HE INTERVIEWED, HE WAS ASKED MANY, MANY QUESTIONS
20 ABOUT THE INTERVIEWS HAVING TO DO WITH THE UNDERLYING FACTS
21 THAT HE LEARNED THERE, AND IF THE PLAINTIFFS THINK THAT IT'S A
22 PROBLEM THAT HE COULDN'T SPECIFICALLY REMEMBER WHAT EACH PERSON
23 TOLD HIM OR THAT HIS OPINIONS ARE BASED ON FACTS THAT ARE
24 INCORRECT, THEN I WOULD THINK THAT THEY WOULD HAVE COME IN AND
25 ARGUED THAT.

1 WELL, THEY HAVEN'T.

2 OR THEY COULD HAVE PURSUED IT FURTHER WITH HIM, AND THEY
3 DIDN'T.

4 OR THEY COULD HAVE DEPOSED THOSE PEOPLE, MANY OF WHOM THEY
5 NEVER ASKED TO DO, NOTWITHSTANDING THAT THEY WERE FULLY
6 DISCLOSED, AND SAY, YOU KNOW, "WHAT DID YOU TELL DR. MURPHY?"
7 AND THEN TEST HIS OPINIONS AGAINST THAT.

8 SO THE POINT IS, HE DISCLOSED WHAT HE NEEDED TO DISCLOSE.
9 THERE WERE MANY WAYS -- IF THEY WANT TO CHALLENGE WHAT THOSE
10 UNDERLYING FACTS ARE, THEY WERE ENTITLED TO DO THAT IN ALL OF
11 THE USUAL WAYS.

12 AND AS I SAID BEFORE, THERE'S NOTHING EITHER LEGALLY OR,
13 FRANKLY, LOGICALLY THAT GETS YOU TO THESE PRELIMINARY NOTES
14 THAT WERE TAKEN, ESPECIALLY WHEN WE HAVE THIS VERY BROAD
15 STIPULATION.

16 THE COURT: ALL RIGHT.

17 WELL, THANK YOU ALL VERY MUCH. WE'LL SEE YOU, THEN, ON --
18 MARCH 13TH IS WHEN WE SET THIS, RIGHT?

19 THE CLERK: YES.

20 MR. GLACKIN: THANK YOU VERY MUCH, YOUR HONOR.

21 MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.

22 MR. HINMAN: THANK YOU, YOUR HONOR.

23 MR. GLACKIN: AND THANK YOU MEMBERS OF THE COURT
24 STAFF.

25 THE COURT: THANK YOU VERY MUCH FOR ALL OF YOUR

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PRESENTATIONS.

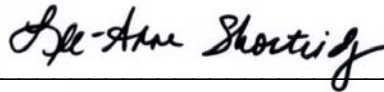
MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.

(THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: FEBRUARY 5, 2013